Extract of Docket Entries in 67 Civ. 1914

May 20, 1968—Filed Opinion #34809—Defendant has moved pursuant to Rules 12(b)(6) and 17(a) to dismiss this action on the grounds that the complaint fails to state a claim and that plaintiff is not the real party of interest. Defendant's motions are granted. The action is dismissed. So ordered. McLean, J.

June 13, 1968—Filed Plaintiff's notice of appeal to USCA, mailed copy to Sullivan & Cromwell.

July 24, 1968—Filed Stipulation and Order extending time of plaintiff-appellant-appellant to file the record on appeal to 8-21-68. Mansfield, J.

August 2, 1968—Filed certification of record on appeal to USCA.

April 14, 1971—Filed true copy of USCA order and opinion that orders of USDC are affirmed without costs in accordance with opinion of this Court—Judgment-Clerk m/n.

Extract of Docket Entries in 65-B-365

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

In Proceedings for Reorganization of Corporations pursuant to Chapter X of the Bankruptcy Act

In the Matter

of

WEBB & KNAPP, INC. and Subsidiaries,

Debtors.

April 17, 1967—#330. Filed petition and notice of motion for an order authorizing Trustee to commence an action or assert a counterclaim against and to compel an accounting by Marine Midland Grace Trust Company of New York—returnable April 21, 1967 at 10:00 A.M.

May 16, 1967—#349. Filed objection by Trustee to allowance of claim and counterclaim of Marine Midland Grace Trust Company of New York—McLean, J.

November 28, 1967—#425. Filed notice of motion for an order dismissing counterclaim asserted in the Trustee's pleading for failure to state a claim upon which relief can be granted because the Trustee has no standing to assert against Marine Midland. The claim set forth in the counterclaim, etc.—returnable December 4, 1967 at 10:00 A.M.

May 20, 1968—#472. Filed opinion #34808 granting Marine Midland's motion to dismiss the reorganization Trustee's counterclaim. The motion to strike the reorganization Trustee's objection is denied. Settle order on notice—McLean, J.

Extract of Docket Entries in 65-B-365

May 22, 1968—#474. Filed Opinion #34822 denying Trustee's motion for an order compelling Marine Midland Grace Trust Company of New York to account for its acts as Indenture Trustee. Settle order on notice—McLean, J.

June 7, 1968—#476. Filed affidavit and order #132 denying motion of the Trustee to compel Marine Midland Grace Trust Company of New York [to account as Indenture Trustee]—McLean, J.

June 7, 1968—#477. Filed affidavit and order #133 re motion of Marine Midland Grace Trust Company of New York, Ordered that the motion to dismiss the counterclaim is granted, and that the counterclaim is hereby dismissed, and it is further ordered that the motion to strike the objection is denied—McLean, J.

June 13, 1968—#478. Filed notice of appeal from order #132 (paper #476).

June 13, 1968—#479. Filed notice of appeal from order #133 (paper #477).

Above two notices filed by Marshall, Bratter, Greene, Allison & Tucker, 430 Park Avenue, New York, New York 10022—a copy of each mailed to Sullivan & Cromwell, Esqs., 48 Wall Street, New York, New York 10005.

July 3, 1968—#499. Filed notice of appeal from order #133 (paper #477) filed by Sullivan & Cromwell, Esqs., 48 Wall Street, New York, New York—mailed copy to Marshall, Bratter, et al., 430 Park Avenue, New York, New York 10022.

Proof of Claim filed by Marine Midland Grace Trust Company of New York

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

No. 65-B-365

In Proceedings for the Reorganization of Corporations pursuant to Chapter X of the Bankruptcy Act

In the Matter of

WEBB & KNAPP, INC.,

52026 COPORATION

WEBB & KNAPP SOUTHWEST NUMBER THIRTEEN CORPORATION,

WEBB & KNAPP SOUTHWEST NUMBER FOURTEEN CORPORATION,

WEBB & KNAPP SOUTHWEST NUMBER FIFTEEN CORPORATION,

WEBB & KNAPP SOUTHWEST NUMBER SIXTEEN CORPORATION, and 91234 CORPORATION,

Debtors.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

FRANK C. STRAAT, residing at No. 327 Byron Place, Borough of Maywood, County of Bergen, State of New Jersey, being duly sworn, deposes and says:

1. I am a Vice President of Marine Midland Grace Trust Company of New York (hereinafter "Marine Midland"), a banking corporation organized and existing under the laws of the State of New York, having its principal place of business at No. 120 Broadway in the City,

County and State of New York and formerly known as The Marine Midland Trust Company of New York. I am duly authorized to make this proof of claim.

2. Webb & Knapp, Inc., one of the above-named debtors (hereinafter the "Debtor"), was at and before the filing of the petition herein for its reorganization under Chapter X of the Act of Congress relating to bankruptcy, and still is, justly and truly indebted to Marine Midland in the sum of $51,447.55.

3. The consideration of said debt is as follows: Marine Midland is Indenture Trustee of the Debtor under an Indenture dated as of June 1, 1954 pursuant to which the Debtor issued securities, namely, 5% Sinking Fund Debentures due June 1, 1974 and the coupons thereto attached in the instance of Debentures issued with coupons attached. A copy of the Indenture, duly certified by the undersigned, is annexed hereto and made part hereof as Exhibit A. In its capacity as Indenture Trustee, Marine Midland rendered services, made disbursements and incurred expenses prior to May 7, 1965, the date of the filing of the petition for reorganization herein. On or about August 19, 1964, Marine Midland mailed to the Debtor its statement dated August 19, 1964, in the amount of $19,248.14, for its services (including extraordinary services), disbursements and expenses as Indenture Trustee for the period December 1, 1963 to May 31, 1964; on or about January 14, 1965, Marine Midland mailed to the Debtor its statement dated January 14, 1965, in the amount of $8,438.97, for its services (including extraordinary services), disbursements and expenses as Indenture Trustee for the period June 1, 1964 to November 30, 1964; Marine Midland prepared, but did not mail to the Debtor, a statement dated May 6, 1965, in the amount of $12,829.84, for its services (including extraordinary serv-

ices), disbursements and expenses as Indenture Trustee for the period December 1, 1964 to May 6, 1965. In addition, Marine Midland has received a statement from its counsel for legal fees and expenses payable by the Indenture Trustee in the total amount of $24,189.14, of which I am informed and believe $10,930.60 is attributable to services rendered and disbursements and expenses incurred on behalf of the Indenture Trustee prior to May 7, 1965 and the balance is attributable to services rendered and disbursements and expenses incurred in connection with the reorganization proceedings herein, including, among other things, preparation and filing of the petition for reorganization, the affidavit pursuant to Rule X-4 of the Bankruptcy Rules of this Court, the Indenture Trustee's statement pursuant to Section 211 of the Bankruptcy Act, conferences in chambers concerning the petition for reorganization and the form of orders to be signed, and preparation of the order approving the petition for reorganization and appointing the Trustee of the Debtor, all of which were for the direct benefit of the estate of the Debtor. Application to this Court for the allowance of such balance as reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred to May 31, 1965 in connection with the administration of the estate of the Debtor will be made by the Indenture Trustee. Copies of the statements hereinbefore mentioned are annexed hereto and made part hereof as Exhibits B, C, D and E, respectively.

4. No part of said debt has been paid.

5. There are no set-offs or counterclaims to said debt.

6. Marine Midland does not hold and has not, nor has any person by its order, or, to the knowledge or belief

of the undersigned, for its use, had or received, any security or securities for said debt except Marine Midland has the right to a lien pursuant to the terms of the aforementioned Indenture upon all securities and other considerations to which the holders of the Debentures may become entitled herein, plus such other security as the terms of said Indenture may afford Marine Midland.

7. A copy of the Indenture, the instrument upon which said debt is founded, is annexed hereto and made part hereof as Exhibit A. The original of the Indenture is in the possession of Marine Midland and will be exhibited on request.

8. Marine Midland makes this proof of claim without prejudice to and with reservation of its rights against any and all persons who may be liable in respect of the subject matter of this proof of claim.

9. Marine Midland reserves its rights to amend this proof of claim in any respect at any time or times.

FRANK C. STRAAT
Frank C. Straat
Vice President
Marine Midland Grace Trust
Company of New York

(Subscribed and sworn to June 14, 1966.)

Exhibit A to Proof of Claim

(Indenture which is part of the proof of claim and marked Exhibit "A" thereto is not included herein. Copies of the indenture will be submitted to the Court pursuant to Rule 38.)

Exhibit B to Proof of Claim

Please retain the bill and return this stub with your remittance. Unless requested, we will not send you a receipt as our endorsement on your check will serve this purpose.

Enclosed check for $19,248.14 covers Services & Disbursements.

Name Webb & Knapp, Inc.

Ref. Corporate Trust 8/19/64 Office Main.

THE MARINE MIDLAND TRUST COMPANY OF NEW YORK
NEW YORK, N. Y.

August 19, 1964

Webb & Knapp, Inc.
383 Madison Avenue
New York 17, New York

For ordinary services as Trustee for period December 1, 1963 to May 31, 1964 including extraordinary services.		
Bond Interchange Transactions		
Authentication of Debentures a/c of transfer. 45 debentures authenticated @ 50¢ each	$	22.50
For services rendered in the redemption of scrip certificates.		
11 lots @ 50¢ each		5.50
For sorting, listing and cremating 9136 cancelled 5% Sinking Fund Coupons as per cremation certificates dated December 18, 1963 @ $10.00 per 1,000		91.36
For sorting, listing and cremating cancelled 5% Sinking Fund Bonds as per cremation certificate dated April 17, 1964. Minimum Fee		10.00

Exhibit B to Proof of Claim

For the preparation of a list of registered holders as of record May 29, 1964 forwarded to Bankers Trust Co.	
665 holders @ $25.00 per 1,000	16.63
For services rendered in connection with the redemption of $430,400 principal amount of 5% Debentures due 6/1/74 account of Sinking Fund due 6/1/64 @ ⅛ of 1%	538.00
For the maintenance of Debentureholders accounts for year ending May 31, 1964. 715 accounts maintained @ 50¢ each	357.50
Annual Administration services under Indenture of Mortgage dated June 1, 1954, payable (in advance) for the period June 1, 1964 to May 31, 1965.	
$4,298,200 principal amount of Debentures outstanding @ $225 per million	967.10
Minimum annual fee (in advance) for acting as Registrar as to principal only and principal and interest, including the registration of 150 Debentures	150.00
Additional services as Trustee not falling within the area of ordinary administrative functions were required commencing with May 25, 1964 when it was first learned that the company would not be able to make the Sinking Fund payment due on that date, which was followed by the announcement on or about May 27th that the company also would not be able to meet the semi-annual interest payment due June 1, 1964. This involved immediate review of the Indenture provisions governing this situation, conferences with counsel, company officials and their counsel, meet-	

ing of senior officers and a report to the Officers' Trust Committee, and preparation of notice dated June 3, 1964 pursuant to Section 10.3 of the Indenture. (At this particular time the Trustee was awaiting details of the company's plan for altering the provisions of the Indenture, which it understood they intended to submit to a Debentureholders' meeting.) A meeting with the company on June 11th revealed a change in their plans involving not calling any Debentureholders' meeting and signifying that interest would be paid before expiration of the grace period and the Sinking Fund would be paid by July 31, 1964. The Trustee requested and received and reviewed at length certain data to assist it in determining courses of action which might be followed after June 30th when, under the most liberal interpretation of the Indenture, the Sinking Fund default grace period would expire. The Trustee determined that for the present it would not accelerate the entire indebtedness in consideration of the interest payment having been made and expectation that the Sinking Fund payment would be made as promised. A letter to Debentureholders was prepared which was dated July 14th. During the latter stages of the month many disturbing developments were dealt with as they arose, including knowledge that judgments were being obtained, restraints were being levied against accounts of the company; such restraints were being vacated and the filing of a bankruptcy petition under Chapter XI by Zeckendorf Hotels Corporation. Continual review, discussions and decisions were required on a daily basis involving senior officers, Executive Committee and Corporate Trust officers and counsel to and including July 31st, the date on which the Sinking Fund payment was made $7,500.00 $9,658.59

Exhibit B to Proof of Claim

DISBURSEMENTS.

Stationery, etc.	$ 69.67	
Professional services and disbursements of Messrs. Sullivan & Cromwell as per attached statement	8,358.53	
Payment to Albert Frank-Guenther Law, Inc. for printing Redemption notice	1,016.92	
Registered mail charges (postage used)	144.43	$ 9,589.55
		$19,248.14

Exhibit B to Proof of Claim

SULLIVAN & CROMWELL

48 WALL STREET,

NEW YORK 5

August 14, 1964

THE MARINE MIDLAND TRUST COMPANY OF NEW YORK

to

Sullivan & Cromwell,

DUPLICATE

In full for professional services from June 1, 1964 to and including July 31, 1964 in connection with your trusteeship under the Webb & Knapp Indenture of June 1, 1954.

Our Fee, ...	$6,000.00
Miscellaneous disbursements, copying and typewriting ..	343.03
	6,343.03
To statement rendered June 1, 1964	2,015.50
	$8,358.53

Exhibit B to Proof of Claim

SULLIVAN & CROMWELL

CABLE ADDRESS: "LADYCOURT", NEW YORK

48 WALL STREET,

NEW YORK 5

June 1, 1964

THE MARINE MIDLAND TRUST COMPANY OF NEW YORK
in account with Sullivan & Cromwell,

DUPLICATE

In full for our professional services rendered from February 28, 1963 through May 31, 1964, to you as Trustee under the Indenture with Webb & Knapp, Inc., involving study, conferences and advice with respect to financial difficulties of Webb & Knapp and the construction and operation of provisions of the Indenture.

Our Fee, ...	$2,000.00
Miscellaneous disbursements, copying and typewriting ..	.15.50
	$2,015.50

Exhibit C to Proof of Claim

Please retain the bill and return this stub with your remittance. Unless requested, we will not send you a receipt as our endorsement on your check will serve this purpose.

Enclosed check for $8,438.97 covers Services & Disbursements

Name Webb & Knapp, Inc.

Ref. Corporate Trust Office Main

THE MARINE MIDLAND TRUST COMPANY OF NEW YORK
NEW YORK, N. Y.

January 14, 1965

Webb & Knapp, Inc.
383 Madison Avenue
New York 17, New York

For services as Trustee under Indenture of Mortgage dated June 1, 1954, period June 1, 1964 to November 30, 1964.

Bond Interchange Transactions

Authentication of Debentures account of transfers, exchange or split-ups.		
162 Debentures authenticated @ 50¢ each	$	81.00
For services rendered in redemption of Scrip certificates.		
19 lots @ 50¢ each		9.50
For the preparation and mailing of Trustee's Annual Report as of September 1, 1964. Minimum fee		25.00
For the preparation of a list of registered holders as of record November 23, 1964.		
579 accounts @ $25.00 per 1,000		14.48

Exhibit C to Proof of Claim

Additional services as Trustee not falling within the area of ordinary administrative functions were required throughout the period from August 1, 1964 to November 30, 1964. Under instructions of our Executive Committee due to the continuance of defaults under the Indenture, we were required to make weekly reports of discussions between our officers and senior officers of the company concerning any adverse developments which might come to our attention, as well as the company's progress toward refinancing or liquidating their overdue obligations and their negotiations to dispose of major properties. During this period we were served with six Restraining Notices against the Webb & Knapp, Inc. account and we followed closely each one until we were notified that such notices were vacated. It was not until October 7th that we finally received the annual Compliance Certificates pursuant to Section 3.6 of the Indenture which had originally been requested on June 15th and this matter had to be followed assiduously. Special attention had to be directed to the preparation of the Trustee's Annual Report to Debentureholders pursuant to Section 10.10 of the Indenture to acquaint the Debentureholders of the facts concerning the defaults known to us. We also prepared a brief notice to Debentureholders dated August 12, 1964 concerning the availability of funds for interest and Sinking Fund. We received specific financial information in written form under the dates of August 26th and October 13th and each letter was studied in detail, brought to the attention of senior officers and the Executive Committee and counsel $5,000.00 $5,129.98

Exhibit C to Proof of Claim

DISBURSEMENTS

Stationery, etc.	$ 6.25	
Professional services and disbursements of Messrs. Sullivan & Cromwell as per attached statement	2,608.19	
Payment to Appeal Printing Co. for printing Notice of Holders dated June 3, 1964 and July 14, 1964	362.96	
Payment to Appeal Printing Co. for printing Notice to Holders dated August 12, 1964	93.60	
Payment to Bowne & Co., Inc. for printing copies of Annual Trustee's Report	60.32	
Payment to American Banknote Co. for 300 $100 Denomination registered debentures	130.00	
Postage used in mailing Trustee's Annual Report	41.85	
Registered mail charges (postage used)	5.82	$3,308.99
		$8,438.97

Exhibit C to Proof of Claim

SULLIVAN & CROMWELL

CABLE ADDRESS: "LADYCOURT" NEW YORK

48 WALL STREET

NEW YORK 5

December 1, 1964

THE MARINE MIDLAND TRUST COMPANY OF NEW YORK

in account with Sullivan & Cromwell,

DUPLICATE

In full for professional services from August 1, 1964 to and including November 30, 1964 in connection with your trusteeship under the Webb & Knapp Indenture of June 1, 1954.

Our Fee, ...	$ 2,500.00
Miscellaneous disbursements, copying and typewriting ..	108.19
	2,608.19
To statement rendered June 1, 1964	2,015.50
To statement rendered August 14, 1964	6,343.03
	$10,966.72

Exhibit D to Proof of Claim

Please retain the bill and return this stub with your remittance. Unless requested, we will not send you a receipt as our endorsement on your check will serve this purpose.

Enclosed check for $12,829.84 covers Services & Disbursements
Name Webb & Knapp, Inc.
Ref. Corporate Trust Office Main

MARINE MIDLAND GRACE TRUST COMPANY OF NEW YORK
NEW YORK, N. Y.

May 6, 1965

Webb & Knapp, Inc.
383 Madison Avenue
New York 17, New York

For services as Trustee under Indenture of Mortgage dated June 1, 1954, period December 1, 1964 to May 6, 1965:

Bond Interchange Transactions

Authentication of Debentures account of transfers, exchange or split-ups.

159 debentures authenticated @ 50¢ each	$	79.50
For services rendered in redemption of Scrip Certificates.		
16 lots @ 50¢ each		8.00
For sorting, listing and cremating 8458 cancelled 5% Sinking Fund Coupons as per cremation certificate dated December 3, 1964 @ $10.00 per 1,000		84.58
Additional services as Trustee not falling within the area of ordinary administrative functions for the period from December 1, 1964 to and including May 6, 1965, including:		

Exhibit D to Proof of Claim

Continued weekly reports covering discussions between our offices with one or more of the senior offices of the company to determine to our satisfaction in reporting to our Executive Committee whether any current developments might be considered sufficiently adverse to require drastic action; to consult with our counsel and make reports for the files with regard to any refinancing or liquidations of debt of which we learned or bankruptcies of subsidiaries, including a complete review of the Paramount transaction and the March, 1965 British and Bankers Life & Casualty refinancings; reviewing and following closely 8 restraining notices against the account of Webb & Knapp, Inc. until all were vacated (one has not been vacated to date); preparation of December 4, 1966 and January 12, 1965 notices to Debentureholders re interest payment and other defaults; consideration of publicity concerning repledging of certain collateral, drafting December 3rd letter to company and receiving December 18th reply; drafting letter of January 11th and receiving the company's January 26th reply concering the updating of certain defaults; consideration of copy furnished to us by the company of its letter of January 22nd to Value Line Investment Fund, resulting in our drafting a request dated January 29th for further information (no reply ever received in writing); preparation of April 16th notice to company regarding forthcoming Sinking Fund; preparation of April 22nd notice to the company regarding compliance with Section 5.3 of the Indenture and finally the receipt of company's letter dated April

29th concerning such Section and authorizing our action to draw Debentures; receipt from Webb & Knapp, Inc. May 4th in the afternoon of copies of Gulf States Land & Industries, Inc. prospectus dated April 21, 1965; subsequent conferences with our counsel and the calling of special Executive Committee meeting of May 5th; and conferences among the senior officials of the bank with regard to the publicity surrounding the suspension of trading securities of Webb & Knapp, Inc. on the American Stock Exchange and the SEC Order for temporary suspension of trading through any medium of the securities of Webb & Knapp, Inc. on May 4 and May 5th. During all of this period our Executive Committee met 23 times in regular session and 2 times in extraordinary session and at each meeting devoted considerable attention to Webb & Knapp, Inc. reports made by the officers of the company	$12,000.00	$12,172.08

DISBURSEMENTS

Stationery, etc.	$ 44.59	
Payment to Appeal Printing Co. for 1000 Notice to Holders dated 12/4/64	135.20	
Payment to Appeal Printing Co. for 1000 Notice to Holders dated January 12, 1965	87.36	
Payment to Herald Tribune for publishing redemption notice on May 1, 1965	275.00	
Postage used in mailing Notice to Holders and Redemption Notices	88.09	
Mail charges (postage used)	27.52	657.76
		$12,829.84

Exhibit E to Proof of Claim

SULLIVAN & CROMWELL

CABLE ADDRESS: "LADYCOURT" NEW YORK

48 WALL STREET

NEW YORK 5

September 21, 1965

MARINE MIDLAND GRACE TRUST COMPANY OF NEW YORK
in account with Sullivan & Cromwell,

In full for our professional services rendered from December 1, 1964 to May 31, 1965 to you as Trustee under the Webb & Knapp Indenture dated as of June 1, 1954.

Our services included: advising the Bank generally and specifically with respect to the discharge of its trusts under the Indenture; calls, conferences and correspondence with Bank officers and with representatives of Webb & Knapp, Inc. concerning the latter's affairs and condition; investigating and reviewing facts relating to possible defaults by Webb & Knapp, Inc. with respect to its obligations under the Indenture and advising the Bank with respect thereto; upon determining that the interests of debenture holders so required, preparing papers necessary to accelerate Webb & Knapp's obligation to discharge the outstanding debentures; preparing and filing complaint against Webb & Knapp, Inc. seeking payment of its obligations to debenture holders; preparing and filing papers necessary to commence proceedings under Chapter X of the Bankruptcy Act with respect to Webb & Knapp, Inc. in the United States District Court for the Southern District of New York.

Our Fee, ... $22,500.00

Exhibit E to Proof of Claim

DISBURSEMENTS

Paid Clerk of the United States District Court for the Southern District of N. Y. for filing fees	$120.00	
Photostating and reproducing documents	647.09	
Miscellaneous disbursements, copying and typewriting	922.05	1,689.14
		$24,189.14

Notice of Motion for an Order Authorizing the Trustee to Commence an Action or Assert a Counterclaim and to Compel an Accounting by Marine Midland Grace Trust Company of New York

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

No. 65-B-365

In Proceedings for the Reorganization of Corporations pursuant to Chapter X of the Bankruptcy Act.

In the Matter

of

WEBB & KNAPP, INC., and subsidiaries,

Debtors.

Sirs:

PLEASE TAKE NOTICE, that upon the annexed petition of Mortimer M. Caplin, duly verified the 12th day of April, 1967, and upon all proceedings heretofore had herein, the undersigned will move before Honorable Edward C. McLean, United States District Judge for the Southern District of New York at the United States Court House, Room 619, Foley Square, New York, New York, on the 21st day of April, 1967 at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order authorizing the Trustee to commence an action or assert a counterclaim against, and to compel an accounting by Marine Midland Grace Trust Company, and for such other and further relief as to the Court may seem just and proper.

Dated: New York, New York.
April 14, 1967

Notice of Motion for an Order Authorizing the Trustee to Commence an Action or Assert a Counterclaim and to Compel an Accounting by Marine Midland Grace Trust Company of New York

Yours, etc.

MARSHALL, BRATTER, GREENE,
ALLISON & TUCKER
Attorneys for the Trustee
430 Park Avenue
New York, New York 10022
421-7200

To:

SULLIVAN & CROMWELL, Esqs.
Attorneys for the Marine Midland Trust Company of New York
Indenture Trustee
48 Wall Street
New York, New York

UNITED STATES SECURITIES AND EXCHANGE COMMISSION
225 Broadway
New York, New York
Attention: Richard V. Bandler, Esq.

MAURICE ISERMAN, Esq.
Attorney for Debtors and Attorney for Webb & Knapp Profit Sharing Trust
60 East 42nd Street
New York, New York 10017

CRAVATH, SWAINE & MOORE, Esqs.
Attorneys for Chemical Bank New York Trust Company
One Chase Manhattan Plaza
New York, New York

CHARLES M. GOLDMAN, Esq.
Attorney for Certain Preferred Stockholders
89 State Street
Boston, Massachusetts

Notice of Motion for an Order Authorizing the Trustee to Commence an Action or Assert a Counterclaim and to Compel an Accounting by Marine Midland Grace Trust Company of New York

FRANK A. BYRNES, Esq.
Attorney for New York Life Insurance Company
51 Madison Avenue
New York, New York

DAVID A. ROSENBERG, Esq.
Attorney for Ingersoll-Rand Financial Corporation
11 Broadway
New York, New York 10004

SECRETARY OF THE TREASURY
TREASURY DEPARTMENT
Washington, D. C.

ROYALL, KOEGEL & ROGERS, Esqs.
Attorneys for National Bankers Life Insurance Co.
200 Park Avenue
New York, New York

STRASSER, SPIEGELBERG, FRIED & FRANK, Esqs.
Attorneys for James M. Jacobson
120 Broadway
New York, New York

DAVIS, POLK, WARDWELL, SUNDERLAND & KIENDL, Esqs.
Attorneys for The Bank of Nova Scotia
One Chase Manhattan Plaza
New York, New York 10005

SATTERLEE, WARFIELD & STEPHENS, Esqs.
Attorneys for E. Leslie Sefton
277 Park Avenue
New York, New York 10017

Notice of Motion for an Order Authorizing the Trustee to Commence an Action or Assert a Counterclaim and to Compel an Accounting by Marine Midland Grace Trust Company of New York

Berlack, Israels & Liberman, Esqs.
Attorneys for Unsecured Creditors Committee
26 Broadway
New York, New York

Maxwell & Diamond, Esqs.
Attorneys for Manastor Associates
276 Fifth Avenue
New York, New York

Goldfeld, Charak & Goldman, Esqs.
Attorneys for Cole, Fisher & Rogow, Inc.
711 Fifth Avenue
New York, New York

White & Case, Esqs.
Attorneys for United States Steel Corporation
14 Wall Street
New York, New York 10005

Sage, Gray, Todd & Sims, Esqs.
Attorneys for Royal Bank of Canada
40 Wall Street
New York, New York

Friedman & Friedman, Esqs.
Attorneys for Cities Service Oil Co. Ltd.
55 North Broadway
Hicksville, New York

Shearman & Sterling, Esqs.
Attorneys for Covent North American Properties Limited and Covent Delaware, Inc.
20 Exchange Place
New York, New York

Notice of Motion for an Order Authorizing the Trustee to Commence an Action or Assert a Counterclaim and to Compel an Accounting by Marine Midland Grace Trust Company of New York

ROSENWASSER & HALPERIN, Esqs.
Attorneys for Fried, Beck & Tannenbaum
515 Madison Avenue
New York, New York

BELSON, CONNOLLY & BELSON, Esqs.
Attorneys for Kelly & Gruzen
32 Broadway
New York, New York 10004

ECKERT, SEAMANS & CHERIN, Esqs.
Attorneys for Aluminum Company of America
Porter Building, Tenth Floor
Sixth Avenue and Grant Street
Pittsburgh, Pennsylvania 15219

WEISMAN, ALLAN, SPETT & SHEINBERG, Esqs.
Attorneys for Manufacturers Hanover Trust Company
1501 Broadway
New York, New York

ROBERT M. MORGENTHAU, Esq.
United States Attorney
United States Court House
Foley Square
New York, New York

Petition for an Order Authorizing the Trustee to Commence an Action or Assert a Counterclaim against, and to Compel an Accounting by Marine Midland Grace Trust Company of New York

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

No. 65-B-365

In Proceedings for the Reorganization of Corporations pursuant to Chapter X of the Bankruptcy Act

In the Matter

of

WEBB & KNAPP, INC. and subsidiaries,

Debtors.

To: THE HONORABLE EDWARD C. MCLEAN, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

The petition of MORTIMER M. CAPLIN, Trustee of the Debtors, respectfully states:

1. On May 7, 1965, the Marine Midland Trust Company of New York ("Indenture Trustee"), as trustee pursuant to an indenture dated as of June 1, 1954 ("Indenture"), providing for the issuance of 5% Sinking Fund Debentures due June 1, 1974 ("Debentures") of Webb & Knapp, Inc. ("Debtor"), filed a petition in the United States District Court for the Southern District of New York ("Court") for the reorganization of the Debtor pursuant to Chapter X of the Bankruptcy Act.

2. On May 18, 1965, by Order No. 3 of the Court, Mortimer M. Caplin was appointed Trustee of the Debtor, duly

Petition for an Order Authorizing the Trustee to Commence an Action or Assert a Counterclaim against, and to Compel an Accounting by Marine Midland Grace Trust Company of New York

qualified thereafter and has continued since then to act as such Trustee.

3. Petitioner seeks the Court's authorization to institute an action on his own behalf and on behalf of all of the holders of Debentures against the Indenture Trustee for damages resulting from its breach of its fiduciary obligation and for an accounting. Also, Petitioner seeks authorization to object to a proof of claim filed by the Indenture Trustee on its own behalf (more fully described in paragraph 6 herein) and to assert a counterclaim thereto.

4. The Indenture, dated as of June 1, 1954, between the Debtor and the Indenture Trustee, provided for the issuance of the Debtor's Debentures in an aggregate principal amount of $8,607,600, such Debentures to be designated as "5% Sinking Fund Debentures due June 1, 1974." The Indenture was entered into in accordance with the Trust Indenture Act of 1939. Among other things, it provided for the form, issue, registration and redemption of the Debentures and contained covenants and duties and responsibilities of the Debtor and Indenture Trustee.

5. As at May 7, 1965, the date the Chapter X petition was filed, the principal amount of Debentures outstanding was $4,298,200, the reduced amount resulting from sinking fund payments made annually for the years 1955 through 1964, and the retirement of Debentures. Interest was paid semi-annually on the Debentures from December 1955 through December 1964.

6. On June 15, 1966 a proof of claim was filed in these proceedings by the Indenture Trustee on behalf of the Debentureholders in the amount of $4,298,200, representing principal and accrued interest from December 1, 1964. In addition, the Indenture Trustee filed a proof of claim on its

own behalf claiming that $51,447.55 was due to it for services rendered, disbursements made and expenses incurred by it as Indenture Trustee, prior to the filing of the Chapter X petition including some expenses attributable to the preparation and filing of the Chapter X petition and conferences relating thereto.

7. Among the covenants made by the Debtor in the Indenture are the following, all of which are set forth in Article III:

> A provision that the Debtor will punctually pay the principal and interest to become due in respect of all Debentures according to their terms. (Section 3.1)
>
> A provision forbidding the Debtor to incur or assume indebtedness from money borrowed or to purchase any real property or interests in real property unless its consolidated tangible assets as defined in the Indenture equal 200% of its remaining liabilities as defined therein. (Section 3.6)
>
> A requirement that the Debtor file with the Indenture Trustee within 120 days after the close of each fiscal year an officers' certificate stating that in the course of the performance by the signers of their duties as officers of the Debtor they would normally obtain knowledge of any default by the Company in performance or fulfillment of any covenant, agreement or condition contained in the Indenture, and stating whether or not they had obtained knowledge of any such default, and, if so, specifying each such default of which the signers had knowledge and the nature of such default. (Section 3.11)

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8. Included among the defaults as defined in Section 6.1 of Article VI of the Indenture were (a) failure to pay the principal of any of the Debentures when and as the same shall become due and payable, (b) failure to pay any installment of interest on any of the Debentures when and as the same shall become due and payable, (c) failure to pay any installment of the sinking fund when and as the same shall become due and payable, (d) failure to perform or observe any other of the covenants, conditions or agreements on the part of the Debtor contained in the Indenture if such failure continued for a period of 60 days after written notice to the Debtor from the Indenture Trustee and (e) acceleration of any indebtedness of the Debtor in the event of a default as defined in any mortgage, indenture or instrument executed by the Debtor.

9. During the period from January 1, 1959 to May 7, 1965 the Debtor entered into hundreds of loan and purchase transactions, involving tens of millions of dollars despite the fact that during all or most of that period the Debtor failed to maintain the ratio required by Section 3.6 of the Indenture which was designed and intended to assure sufficient asset coverage to protect the interest of the Debentureholders.

10. Commencing in 1955 and continuing through 1964, the officers of the Debtor in each year prepared and Debtor's directors unanimously (except for one director in 1963) approved appraisals which were submitted to the Indenture Trustee valuing the property of the Debtor for the purpose of satisfying the Indenture Trustee of its compliance with Section 3.6 of the Indenture. Such officers' appraisals contained grossly over-stated valuations of real estate owned by the Debtor, Investments made by the Debtor in subsidiaries, receivables from subsidiaries and other assets.

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11. In each of the years commencing in 1955 and continuing through 1964, the Debtor delivered to the Indenture Trustee copies of the officers' appraisals for the previous calendar year with a certificate stating that the Debtor had complied with the required ratio. The following is a table showing the ratios for the calendar years 1959 through 1963.

Year	Percent of Defined Assets to Defined Liabilities
1959	201.35
1960	216.88
1961	258.30
1962	206.90
1963	200.56

12. The Indenture Trustee accepted the appraisals submitted to it by the officers of the Debtor without questioning their accuracy and reliability. Furthermore, the Indenture Trustee knew or should have known that the standard used by the directors in appraising the assets of the Debtor was inconsistent with the protection intended by the Indenture.

13. Thus an examination of the appraisal submitted to the Indenture Trustee in July, 1959 for the year ended December 31, 1958 indicates an aggregate valuation of $372,000,000 for the consolidated tangible assets as opposed to a gross book value of those assets of only $245,000,000 an increase of $127,000,000. Despite this enormous inflation of book value the resulting ratio of assets to liabilities was only 202.61%. In other words a reduction of slightly more than $8,000,000 of appraised asset value would have resulted in a ratio of less than 200%.

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14. The significance of these figures is highlighted when reference is made to certain items representing a very substantial percentage of the total. Thus certain unimproved land in the Bronx which had a book value of only $2,900,000 was appraised at $27,500,000 for 1958 despite the fact that for the prior year, the same land had been appraised for $15,000,000. Other vacant land located in Los Angeles, California which had a book value of $2,200,000 was valued at $11,500,000 for 1958 although it had been valued at $7,000,000 for the prior year. Thus these two real estate investments comprising vacant land in Bronx, New York and in California were valued at $34,000,000 in excess of their book value and at $17,000,000 more than they had been valued the year before.

15. The situation in subsequent years followed an identical pattern except that the appraisals were even more greatly exaggerated. Some comparable figures for the subsequent years are as follows:

For the Year Ended 12/31	Aggregate Book of Consolidated Assets	Officers Appraised Value of Consolidated Assets	Asset Liability Ratio per Officers Appraisals	Excess of Officers Appraised Value Over Book Value
1959	$311,647,085	$487,638,449	201.35	$175,991,364
1960	283,960,356	453,038,688	216.88	169,078,332
1961	141,847,898	202,732,589	218.30	60,884,691
1962	168,383,618	257,406,151	206.90	89,022,493
1963	142,852,889	234,746,003	200.56	91,893,114

16. While the officers of the Debtor found it necessary to strain considerably to give the appearance of meeting the required ratio for the year ended December 31, 1958, their

attempts in subsequent years to give the appearance of compliance with the covenant in the Indenture exceeded all bounds in their flagrancy. For example, after having increased in 1958 from $15,000,000 to $27,000,000 the appraised value of the vacant land in the Bronx, this land was valued in 1959 at $64,000,000 an increase of $37,000,000. The only changes in circumstances on which any increase in valuation could have been based were the addition of land at a cost of $1,200,000 to the parcel and the execution of a lease to Freedomland, Inc. at an annual net rental of $600,000 with increases in subsequent years. These changes could in no way justify the astronomic increase in valuation.

17. In 1963 when the Debtor's problem of complying with the 2-1 ratio requirement became unsually acute, the officers without a murmur of dissent from the Indenture Trustee increased the appraisal from $64,000,000 to $91,000,000 although the Debtor then had less than an 80% interest in this property. In December, 1963 the property was conveyed to a corporation in which the Debtor only owned 80% of the stock. However, its interest was substantially watered down by virtue of other obligations connected with the conveyance. Moreover, as of the date of the submission of the appraisals, the Debtor's interest had been forfeited subject to an option to re-acquire at substantial cost to the Debtor and negotiations were virtually completed for the sale of two-thirds of the property for $15,000,000. All of the facts with respect to the Debtor's interest in this property were known, or would have been known to the Indenture Trustee if it had taken the trouble to examine the Debtor's Annual Report which had been provided to it in August of that year, two months prior to the receipt of the appraisal.

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18. Similarly, the officers grossly overvalued the Debtor's interest in Zeckendorf Properties Corporation ("ZPC"), a subsidiary, 50% of the stock of which was owned by the Debtor. That subsidiary was organized in 1961 at which time the Debtor transferred to it 13 undeveloped or partially developed urban renewal projects, including a substantial part of the Baychester property. Although the interest in ZPC was appraised by the officers at $15,000,000 for the year ended December 31, 1961, when necessity dictated, that appraisal was increased to $50,000,000 for the year ended December 31, 1962, despite the fact that in 1962 the subsidiary experienced serious financial difficulties, and despite the fact that by the time the appraisel for the year ended December 31, 1962 was actually filed with the Indenture Trustee, the interest of the Debtor in ZPC had been redeemed with W & K receiving for its interest five of the thirteen projects having an equity value of considerably less than $50,000,000.

19. The gross exaggerations of property values described with regard to the Baychester property and ZPC were by no means unique. A similar pattern was followed with regard to other properties owned by the Debtor in each of the years from 1958 through 1963. Thus, for example, in 1958 the Debtor owned property in the Lincoln Square area of New York City which in 1958 had a book value of $7,000,000 and which was appraised by officers of the Debtor for $12,000,000. In the following year, 1959, although the property had an increase in book value of only $2,400,000, the officers raised the appraisal on that property by $5,300,000. The pattern was repeated again in the following year when a raise in book value of $3,600,000 was seen by the officers as justification for raising the

appraisal by $8,100,000. Thus, over a period of three years an increase in book value of $6,000,000 was purportedly the basis for an increase in appraised value of $13,400,000.

20. Possibly the most significant aspect of these appraisals was the fact that after two years of experience gained in 1956 and 1957, the officers concluded that appraisals based on current values would not be adequate to satisfy the requirements of the Indenture. Accordingly, they adopted an approach to the appraisals based more on a Pollyanna-like hope for the future than on the realities of the present. Moreover, they made no attempt to hide the standards which they used to guide them, if they can be called standards, when they appended to each appraisal a footnote stating that the appraisals represented their "views as to what the properties could be sold for on a cash basis under favorable market conditions after their earning power shall have been clearly established, . . .". In this connection it is interesting to note that William Zeckendorf, Sr., the Debtor's chief executive, when interrogated by Trustee's counsel, stated, with respect to the Baychester properties, that he anticipated that it would be approximately 1970 before the values which he attributed to that property in 1963 would be realized and then only after the expenditure of several hundred million dollars for improvements.

21. Unfortunately, this blatant disregard for reality on the part of the officers was met by an equally blatant lack of concern on the part of the Indenture Trustee. As appears from the testimony of the trust officer responsible for supervising the Debtor's compliance with the covenants of the Indenture, the Indenture Trustee made no attempt to establish any standards for judging the adequacy of the ap-

praisals, made no attempt to ascertain the standards used by the officers in preparing the appraisals and did not even attach significance to the footnote quoted above. A reading of the testimony makes it apparent that the Indenture Trustee considered its only obligation to be to insist upon an appraisal by the officers in a form acceptable to its accountants indicating the existence of the proper ratio. Needless to say, during the intervals between the receipt of the annual officers' appraisal, the Indenture Trustee made no effort whatever to ascertain whether or not the appropriate ratio was being maintained.

22. It must be conceded that on one occasion during the 10-year history of the Indenture, the Indenture Trustee saw fit to question the gross inflation of the valuation of the Baychester properties, the increase from $27,000,000 to $64,000,000 as of December 31, 1959 which has been referred to earlier in this petition. However, their fears, if such they were, were easily allayed when they were furnished with appraisals by an independent appraiser selected by W & K which indicated that the properties were indeed worth what the officers said they were, provided, however, an 800-unit motel and high-rise apartment developments containing thousands of units were constructed, and the operations of the now defunct Freedomland which was due to open a year later were successful in accordance with the most optimistic projections.

23. It would appear from an examination of all of the appraisals that during virtually the entire period from December 31, 1958 to the filing of the petition herein on May 7, 1965, the Debtor was in default of its covenant to refrain from borrowing monies or purchasing interests in real property when its asset-liability ratio was insufficient in accordance with the requirements of Section 3.6.

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24. As a result, during virtually the entire period of its stewardship, the Indenture Trustee failed to insure for its debentureholders the critical protection provided by the asset-liability ratio requirement of Section 3.6 and permitted the continuous depletion of the equity of the Debtor. For all intents and purposes the Indenture Trustee, by the virtual abdication of its duties, effectively nullified the provisions of Section 3.6 of the Indenture.

25. Such conduct on the part of an Indenture Trustee would be sufficiently reprehensible under the best of circumstances. Such conduct in the light of the poor and constantly deteriorating financial condition of the Debtor can most charitably be characterized as gross negligence. Commencing in 1958 W & K sustained substantial financial losses in every year but one and even in that year its income of approximately $2,500,000 was made possible only by a substantial write-up in value of the Baychester property contributed to ZPC. Without this write-up the company would have sustained a loss of approximately $6,000,000 for that year. The following is a table showing the taxable income and bookkeeping income of the Debtor during the years 1958 through 1963, the year of its last audited report. It is particularly significant that the Debtor's auditors accompanied their last audit with a statement that there was a question as to whether or not the Debtor could be treated as a going concern for purposes of valuing its assets and, accordingly, since they were not in a position to determine the realizable values of the assets they were unable to express an opinion on the financial statement as a whole.

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Year	Taxable Income	Bookkeeping Income
1958	($9,242,761.31)	($6,380,926.00)
1959	(21,190.20)	(1,026,484.00)
1960	(873,643.10)	(6,073,798.00)
1961	(4,916,087.76)	2,462,700.00 [1]
1962	(8,781,589.68)	(19,625,151.00)
1963	(11,156,793.80)	(32,320,953.00)

[1] Includes book profit of $8,995,530.00 on sale on December 19, 1961 to 91273 Corp., a wholly owned subsidiary of Zeckendorf Property Corp., 50% of whose stock being owned by Webb & Knapp, Inc.

26. Armed with the knoweldege readily available to it of the Debtor's financial straits, the failure of the Indenture Trustee to scrutinize the officers' appraisals which purported to reflect compliance only by the smallest margins and then after violent adjustments of prior appraised values, was even more egregious.

27. During the years 1962, 1963 and 1964, the Debtor was guilty of numerous other defaults in the performance of its obligations under the Indenture, each of which should have served to alert the Indenture Trustee to the increasing threat of financial disaster and resulting loss to the debenture holders. Thus, in 1962, the Debtor failed to file its officers' appraisal until August, four months after it was due. Similarly, in 1963, the Debtor was three months late in filing both the officers' certificate of no default and the officers' appraisal. In 1964, the Debtor was late in making the sinking-fund payment due on May 25, 1964 and the semi-annual interest installments due on June 1, 1964. These payments were not made until July 30, 1964 after the Indenture Trustee gave notice to the debentureholders of the fact of default. In addition, during 1964 the officers'

appraisal which was due on April 30 was not filed until some time in October. Also during 1964, maturity dates of certain indebtedness of the Debtor was accelerated because of the Debtor's default in making payments on account of such indebtedness. Such accelerations constituted defaults under the Indenture. Moreover, in 1964 several creditors entered judgments against the Debtor in substantial amounts to the knowledge of the Indenture Trustee. In August of that year, two wholly-owned subsidiaries filed petitions for arrangement pursuant to Chapter XI of the Bankruptcy Act and in the same year a third subsidiary was the subject of an involuntary bankruptcy proceeding.

28. Despite all of these circumstances, the Debtor was permitted during the entire period from 1959 to 1965 to continuously deplete its equity by incurring new obligations and acquiring highly speculative interests in real property with the final result that by the time of the filing of the petition on May 7, 1965 by the Indenture Trustee, the stockholders' equity, which on the basis of officers' appraisal was $214,000,000 for the year ended December 31, 1959 and $84,000,000 for the year ended December 31, 1963 was reduced to a deficit of $38,000,000.

29. When this drastic reduction in equity is considered along with the fact of losses of $70,000,000 during the years 1958 through 1963, the impact on the interest of the debentureholders by the gross negligence of the Indenture Trustee is staggering.

30. In view of all of the foregoing, your petitioner requests permission of this Court to commence action against the Indenture Trustee for the recovery of the damages sustained by virtue of the grossly negligent performance of its fiduciary obligations. Your petitioner seeks to assert this

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claim in the form of both an independent plenary action and by means of a counterclaim to the Indenture Trustee's proof of claim on behalf of itself. In addition, your petitioner requests that this Court order and direct the Indenture Trustee forthwith to file an accounting of its activities as Indenture Trustee from the date of the commencement of the Trust to the present.

Dated: Washington, D. C.
April 12, 1967

MORTIMER M. CAPLIN
Mortimer M. Caplin, Petitioner
MARSHALL, BRATTER, GREENE,
ALLISON & TUCKER
Counsel for the Trustee
430 Park Avenue
New York, New York 10022
421-7200

(Verified April 12, 1965)

Complaint in 67 Civ. 1914, *Mortimer M. Caplin, Trustee in Reorganization of Webb & Knapp, Inc., etc.* v. *The Marine Midland Grace Trust Company of New York*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

67 Civ. 1914

PLAINTIFF DEMANDS A JURY TRIAL

MORTIMER M. CAPLIN, Trustee in Reorganization of WEBB & KNAPP, INC., on behalf of debentureholders under a trust indenture of Webb & Knapp, Inc. to The Marine Midland Trust Company of New York, trustee, dated as of June 1, 1954,

Plaintiff,

against

THE MARINE MIDLAND GRACE TRUST COMPANY OF NEW YORK,

Defendant.

Plaintiff, MORTIMER M. CAPLIN, trustee in reorganization of Webb & Knapp, Inc., by his attorneys, Marshall, Bratter, Greene, Allison & Tucker, as and for his complaint herein, respectfully alleges:

AS AND FOR A FIRST CLAIM FOR RELIEF

1. Plaintiff is the trustee of Webb & Knapp, Inc. (hereinafter referred to as the "Debtor"), a Debtor in reorganization pursuant to Chapter X of the Bankruptcy Act, in proceedings in the United States District Court for the Southern District of New York.

Complaint in 67 Civ. 1914, Mortimer M. Caplin, Trustee in Reorganization of Webb & Knapp, Inc., etc. v. The Marine Midland Grace Trust Company of New York

2. The defendant, The Marine Midland Grace Trust Company of New York (hereinafter referred to as "Marine") is a banking corporation, organized and existing under the laws of the State of New York having its principal place of business in the Southern District of New York. Upon information and belief it is the successor to and has assumed all of the obligations and liabilities of the Marine Midland Trust Co.

3. Jurisdiction of this Court is based on Section 2a of the Bankruptcy Act, 11 U. S. C. § 11a.

4. By order of the United States District Court for the Southern District of New York dated May 18, 1965, plaintiff became vested with title to all property of the Debtor of whatever kind and wherever located and became vested with all the rights, powers, and duties of a trustee appointed under Chapter X, and, to the extent not inconsistent with Chapter X, of a trustee appointed under Section 44 of the Bankruptcy Act, and also was granted such additional rights and powers as a receiver in equity would have if appointed by a court of the United States for the property of the Debtor.

5. For many years prior to the filing of the petition for reorganization, the Debtor was in the business, among other things, of owning, constructing, improving, leasing, operating and managing interests in real estate and acting as broker in connection with the sale, purchase or lease of interests in real estate or the arranging of financing for such sales, purchases or leases.

6. On or about June 1, 1954, the Debtor and Marine as trustee, executed a certain Trust Indenture (hereinafter referred to as the "Indenture") providing for the issuance by the Debtor of 5% Sinking Fund Debentures due June,

1974 in the aggregate principal amount of $8,607,600. Debentures in the total principal amount of $4,298,200 are now outstanding. A copy of said Indenture is annexed hereto as Exhibit "A".

7. In the Indenture, the Debtor made certain covenants and agreements to and with Marine as trustee for the use and benefit of all holders of the debentures to be issued under such Indenture, and Marine undertook in Section 10.1 thereof to perform the duties set forth in the Indenture and to use the same degree of care and skill in the exercise of the rights and powers vested in it as a prudent man would exercise or use under the circumstances in the conduct of his own affairs.

8. The Indenture in Section 3.6 prohibited the Debtor or its consolidated subsidiaries from incurring or assuming any indebtedness resulting from money borrowed or from the purchase of real property or interests in real property on which the Debtor was personally liable, or from purchasing any real property or interests in real property, unless at a date not more than four months prior to such transaction, the Debtor's consolidated tangible assets as defined in the Indenture equalled 200% of the Debtor's liabilities, as defined in the Indenture, after giving effect to the contemplated loan or purchase.

9. The Indenture also contained a covenant in Section 3.11 thereof that the Debtor would file with the defendant, within 120 days after the close of the fiscal year ending December 31, 1954, and within 120 days after the close of each fiscal year thereafter, an officer's certificate stating that in the course of the performance of their duties the officers would normally obtain knowledge of any default by the company in the performance or fulfillment of any covenant, agreement or condition of the Indenture and stat-

ing whether or not they have obtained knowledge of any such default, and, if so, specifying each such default of which the officers have knowledge and the nature thereof.

10. At the time of the issuance of the Debtor's debentures, substantially all of the tangible assets of the Debtor consisted of investments in purchase money mortgages, stock in and receivables from subsidiary corporations, and investments in real estate.

11. During the period from December 31, 1958 through May 7, 1965, the Debtor sustained substantial operating losses and its obligations greatly increased. An apparent profit in 1961 was the result of a revaluation of certain assets in conjunction with their being transferred to a newly formed fifty percent-owned subsidiary.

12. In each of the years 1954 through 1964, the officers of the Debtor at the request of Marine prepared, and the Debtor's directors approved, appraisals of the Debtor's assets containing grossly overstated valuations of certain properties owned by the Debtor for the purpose of satisfying Marine that it was not in violation of the covenant contained in Section 3.6 of the Indenture requiring the Debtor to maintain a two to one ratio of assets to liabilities. These appraisals were prepared and delivered to Marine only once in each year.

13. The appraisals delivered during the years 1958 through 1964 each contained as a footnote the statement that the appraisal represented the officers' "views as to what the properties could be sold for on a cash basis under favorable market conditions, after their earning power shall have been clearly established".

14. The appraisals delivered to Marine as aforesaid were false and fraudulent and in fact at no time during the

period 1958 through 1964 were the Debtor's consolidated tangible assets equal to 200% of its liabilities as required by Section 3.6 of the Indenture. On the contrary, at all times the ratio of consolidated tangible assets to liabilities was substantially less than two to one.

15. Marine at all times knew, or in the exercise of reasonable diligence, should have known that the officers' appraisals were falsely and fraudulently inflated and that the ratio of the Debtor's consolidated tangible assets to its liabilities was such that any borrowings or purchases by the Debtor would and did constitute violations of the Debtor's covenants as set forth in Section 3.6 of the Indenture.

16. Marine at all times knew or should have known that the Debtor was suffering serious financial losses.

17. During the years 1959 through 1965 the Debtor incurred additional indebtedness and purchased additional property despite the fact that Section 3.6 of the Indenture prohibited such borrowing and such purchases unless the required ratio of consolidated tangible assets to liabilities was maintained.

18. It was the obligation of Marine to protect the debentureholders by taking the necessary steps to prevent the Debtor from borrowing any money or purchasing any property during any of the years 1959 through 1975 since any such borrowings or purchases were specifically prohibited by Section 3.6 of the Indenture.

19. The failure of Marine to take appropriate steps to prevent the borrowing of funds or the purchases of property by the Debtor enabled the Debtor to enter into countless transactions in violation of the covenant contained in Section 3.6 of the Indenture with resultant loss and diminu-

tion of assets of the Debtor which caused the net worth of the Debtor to be reduced from $25,066,657 as of December 31, 1958 to a deficit of $38,5[illegible],000 at the time of the filing of the petition in these proceedings.

20. Marine's failure to ascertain that the Debtor was in violation of its obligations pursuant to the provisions of Section 3.6 of the Indenture and its failure to take appropriate steps to protect the debentureholders as aforesaid either constituted willful misconduct or gross negligence in violation of its obligations as Indenture Trustee.

21. By reason of the foregoing, the holders of the Debtor's debentures under the Indenture have suffered damage in the amount of $4,298,200.

WHEREFORE, plaintiff, on behalf of holders of the outstanding debentures issued under the Indenture, demands judgment against Marine in the sum of $4,298,200 together with interest according to law and the costs and disbursements of this action.

Dated: New York, New York
May 15, 1967

MARSHALL, BRATTER, GREENE, ALLISON & TUCKER

By s/ MORTON S. ROBSON
Morton S. Robson
A Member of the Firm

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Objection by the Trustee to Allowance of Claim and Counterclaim of Trustee

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
No. 65-B-365

In Proceedings for the Reorganization of Corporations pursuant to Chapter X of the Bankruptcy Act

In the Matter

of

WEBB & KNAPP, INC., and Subsidiaries,

Debtors.

TO: THE HONORABLE EDWARD C. MCLEAN, JUDGE OF THE UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT OF NEW YORK

MORTIMER M. CAPLAN, Trustee of the Debtors, objects to the allowance of the claim of Marine Midland Grace Trust Company of New York ("Marine"), filed herein in the amount of $51,447.55 and asserts a counterclaim against Marine upon the following grounds:

1. On or about June 1, 1954, the Debtor and Marine as trustee, executed a certain Trust Indenture (hereinafter referred to as the "Indenture") providing for the issuance by the Debtor of 5% Sinking Fund Debentures due June, 1974 in the aggregate principal amount of $8,607,600. Debentures in the total principal amount of $4,298,200 are now outstanding.

2. In the Indenture, the Debtor made certain covenants and agreements to and with Marine as trustee for the use

and benefit of all holders of the debentures to be issued under such Indenture, and Marine undertook in Section 10.1 thereof to perform the duties set forth in the Indenture and to use the same degree of care and skill in the exercise of the rights and powers vested in it as a prudent man would exercise or use under the circumstances in the conduct of his own affairs.

3. The Indenture in Section 3.6 prohibited the Debtor or its consolidated subsidiaries from incurring or assuming any indebtedness resulting from money borrowed or from the purchase of real property or interests in real property on which the Debtor was personally liable, or from purchasing any real property or interests in real property, unless at a date not more than four months prior to such transaction, the Debtor's consolidated tangible assets as defined in the Indenture equalled 200% of the Debtor's liabilities, as defined in the Indenture, after giving effect to the contemplated loan or purchase.

4. The Indenture also contained a covenant in Section 3.11 thereof that the Debtor would file with the defendant, within 120 days after the close of the fiscal year ending December 31, 1954, and within 120 days after the close of each fiscal year thereafter, an officer's certificate stating that in the course of the performance of their duties the officers would normally obtain knowledge of any default by the company in the performance or fulfillment of any covenant, agreement or condition of the Indenture and stating whether or not they have obtained knowledge of any such default, and, if so, specifying each such default of which the officers have knowledge and the nature thereof.

5. At the time of the issuance of the Debtor's debentures, substantially all of the tangible assets of the Debtor consisted of investments in purchase money mortgages, stock in and receivables from subsidiary corporations, and investments in real estate.

Objection by the Trustee to Allowance of Claim and Counterclaim of Trustee

6. During the period from December 31, 1958 through May 7, 1965, the Debtor sustained substantial operating losses and its obligations greatly increased. An apparent profit in 1961 was the result of a revaluation of certain assets in conjunction with their being transferred to a newly formed fifty percent-owned subsidiary.

7. In each of the years 1954 through 1964, the officers of the Debtor at the request of Marine prepared, and the Debtor's directors approved, appraisals of the Debtor's assets containing grossly overstated valuations of certain properties owned by the Debtor for the purpose of satisfying Marine that it was not in violation of the covenant contained in Section 3.6 of the Indenture requiring the Debtor to maintain a two-to-one ratio of assets to liabilities. These appraisals were prepared and delivered to Marine only once in each year.

8. The appraisals delivered during the years 1958 through 1964 each contained as a footnote the statement that the appraisal represented the officers' "views as to what the properties could be sold for on a cash basis under favorable market conditions, after their earning power shall have been clearly established".

9. The appraisals delivered to Marine as aforesaid were false and fraudulent and in fact at no time during the period 1958 through 1964 were the Debtor's consolidated tangible assets equal to 200% of its liabilities as required by Section 3.6 of the Indenture. On the contrary, at all times the ratio of consolidated tangible assets to liabilities was substantially less than two to one.

10. Marine at all times knew, or in the exercise of reasonable diligence, should have known that the officers' appraisals were falsely and fraudulently inflated and that the ratio of the Debtor's consolidated tangible assets to

its liabilities was such that any borrowings or purchases by the Debtor would and did constitute violations of the Debtor's covenants as set forth in Section 3.6 of the Indenture.

11. Marine at all times knew or should have known that the Debtor was suffering serious financial losses.

12. During the years 1959 through 1965 the Debtor incurred additional indebtedness and purchased additional property despite the fact that Section 3.6 of the Indenture prohibited such borrowing and such purchases unless the required ratio of consolidated tangible assets to liabilities was maintained.

13. It was the obligation of Marine to protect the debentureholders by taking the necessary steps to prevent the Debtor from borrowing any money or purchasing any property during any of the years 1959 through 1965 since any such borrowings or purchases were specifically prohibited by Section 3.6 of the Indenture.

14. The failure of Marine to take appropriate steps to prevent the borrowing of funds or the purchase of property by the Debtor enabled the Debtor to enter into countless transactions in violation of the covenant contained in Section 3.6 of the Indenture with resultant loss and diminution of assets of the Debtor which caused the net worth of the Debtor to be reduced from $25,066,657 as of December 31, 1958 to a deficit of $38,500,000 at the time of the filing of the petition in these proceedings.

15. Marine's failure to ascertain that the Debtor was in violation of its obligations pursuant to the provisions of Section 3.6 of the Indenture and its failure to take appropriate steps to protect the debentureholders as aforesaid either constituted willful misconduct or gross negligence in violation of its obligations as Indenture Trustee.

Objection by the Trustee to Allowance of Claim and Counterclaim of Trustee

16. By reason of Marine's willful misconduct or gross negligence as herein set forth, Marine should be denied compensation as Indenture Trustee.

AS AND FOR A FIRST COUNTERCLAIM

17. The Trustee repeats and re-alleges paragraphs 1 through 15 set forth herein.

18. By reason of the foregoing, the holders of the Debtor's debentures under the Indenture have suffered damage in the amount of $4,298,200.

WHEREFORE, the Trustee demands judgment against Marine disallowing the claim made by Marine, and on behalf of holders of the outstanding debentures issued under the Indenture demands judgment against Marine in the sum of $4,298,200 together with interest according to law and the costs and disbursements of this action.

Dated: New York, New York
May 16, 1967

MARSHALL, BRATTER, GREENE,
ALLISON & TUCKER
By S/ MORTON S. ROBSON
Morton S. Robson
A Member of the Firm
Attorneys for Plaintiff
430 Park Avenue
New York, New York 10022

Notice of Motion by Defendant in 67 Civ. 1914, *Mortimer M. Caplin, Trustee in Reorganization of Webb & Knapp, Inc., etc.* v. *The Marine Midland Grace Trust Company of New York*, to dismiss the Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

67 Civ. 1914

MORTIMER M. CAPLIN, Trustee in Reorganization of WEBB & KNAPP, INC., on behalf of debentureholders under a trust indenture of Webb & Knapp, Inc. to The Marine Midland Trust Company of New York, trustee, dated as of June 1, 1954,

Plaintiff,

against

THE MARINE MIDLAND GRACE TRUST COMPANY OF NEW YORK,

Defendant.

SIRS:

PLEASE TAKE NOTICE that upon all of the papers and proceedings herein, the undersigned will move before The Honorable Edward C. McLean in Room 2704 in the United States Court House, Foley Square, New York, New York, on the 4th day of December, 1967, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for

(1) An order pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure dismissing the complaint herein for failure to state a claim upon which relief can be granted

Notice of Motion by Defendant in 67 Civ. 1914, Mortimer M. Caplin, Trustee in Reorganization of Webb & Knapp, Inc., etc. v. The Marine Midland Grace Trust Company of New York, to dismiss the Complaint

because plaintiff has no standing to assert against defendant the claim set forth in the complaint, or, alternatively,

(2) An order pursuant to Rule 17(a) of the Federal Rules of Civil Procedure dismissing the complaint because it is not prosecuted in the name of the real parties interest, and

(3) Such other relief as the Court may deem just and proper.

Dated: New York, New York
November 22, 1967

Yours, etc.

SULLIVAN & CROMWELL
By JOHN DICKEY
(A member of the Firm)
Attorneys for Defendant,
48 Wall Street,
New York, New York 10005

To:

MESSRS. MARSHALL, BRATTER, GREENE,
ALLISON & TUCKER,
Attorneys for Plaintiff,
430 Park Avenue,
New York, New York 10022

Notice of Motion by Marine Midland Grace Trust Company of New York to Dismiss the Counterclaim of the Trustee and Strike the Objection to Allowance of the Proof of Claim of Marine Midland Grace Trust Company of New York

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

No. 65-B-365

In Proceedings for the Reorganization of Corporations

In the Matter

of

WEBB & KNAPP, INC., *et al.*,

Debtors.

SIRS:

PLEASE TAKE NOTICE that upon the Objection by Trustee to Allowance of Claim and Counterclaim, dated May 15, 1967, filed herein by the Trustee in reorganization of the Debtors herein, and upon the proof of claim dated June 14, 1966, filed herein by Marine Midland Grace Trust Company of New York ("Marine Midland") for its own account, the undersigned will move before The Honorable Edward C. McLean in Room 2704 of the United States Court House, Foley Square, New York, New York on the 4th day of December, 1967, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for

(1) An order pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure dismissing the counterclaim asserted in the Trustee's pleading for failure to state a claim upon which relief can be granted because the Trustee has

Notice of Motion by Marine Midland Grace Trust Company of New York to dismiss the Counterclaim of the Trustee and strike the objection to allowance of the proof of claim of Marine Midland Grace Trust Company of New York

no standing to assert against Marine Midland the claim set forth in the counterclaim, or, alternatively,

(2) An order pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure dismissing the counterclaim because there is no summary jurisdiction over the subject matter of the counterclaim, or, alternatively,

(3) An order pursuant to Rule 17(a) of the Federal Rules of Civil Procedure dismissing the counterclaim because it is not prosecuted in the name of the real parties in interest, and

(4) An order pursuant to Rule 12(f) of the Federal Rules of Civil Procedure striking the objection asserted in the Trustee's pleading as constituting an insufficient defense to Marine Midland's proof of claim, and

(5) Such other relief as the Court may deem just and proper.

Dated: New York, New York
November 22, 1967

Yours, etc.,

SULLIVAN & CROMWELL
By JOHN DICKEY
(A Member of the Firm)
Attorneys for Marine Midland
Grace Trust Company of
New York,
40 Wall Street,
New York, New York 10005

To: [All parties on which the counterclaim was served by the Chapter X Trustee]

Opinion and Order of District Court Filed May 20, 1968, Granting Defendant's Motion to Dismiss the Complaint in 67 Civ. 1914, *Mortimer M. Caplin, Trustee in Reorganization of Webb & Knapp, Inc., etc. v. The Marine Midland Grace Trust Company of New York*

#34809.
U. S. District Court
Filed
May 20, 1968
4:40 P.M.
S. D. of N. Y.

UNITED STATES DISTRICT COURT

SOUTHERN DISTORICT OF NEW YORK

Opinion in 67 Civ. 1914

MORTIMER M. CAPLIN, Trustee in Reorganization of WEBB & KNAPP, INC., on behalf of debentureholders under a trust indenture of Webb & Knapp, Inc. to The Marine Midland Trust Company of New York, trustee, dated as of June 1, 1954,

Plaintiff,

against

THE MARINE MIDLAND GRACE TRUST COMPANY OF NEW YORK,

Defendant.

McLEAN, *D.J.*

Defendant has moved pursuant to Rules 12(b)(6) and 17(a) to dismiss this action on the grounds that the complaint fails to state a claim and that plaintiff is not the real party in interest.

Opinion and Order of District Court Filed May 20, 1968, Granting Defendant's Motion to Dismiss the Complaint in 67 Civ. 1914; Mortimer M. Caplin, Trustee in Reorganization of Webb & Knapp, Inc., etc. v. The Marine Midland Grace Trust Company of New York

The complaint may be briefly summarized as follows: Plaintiff is the trustee of Webb & Knapp, Inc. (the Debtor), now in reorganization under Chapter X of the Bankruptcy Act. Defendant is trustee under a trust indenture executed by the Debtor with respect to an issue of 5 per cent debentures of the Debtor due in June 1974. Debentures in the principal amount of $4,298,200 are now outstanding. In the indenture the debtor made certain covenants "for the use and benefit of all holders of the debentures." One of these provided that the Debtor would not incur certain types of indebtedness unless its tangible assets were twice its liabilities. Prior to the Debtor's bankruptcy, defendant, as indenture trustee, failed to enforce this covenant. Defendant accepted appraisals of the Debtor's property, delivered to it by the Debtor, which were false and fraudulent and which defendant knew or in the exercise of due diligence should have known were false and fraudulent. Defendant failed to prevent the Debtor from incurring additional indebtedness despite the fact that the Debtor's assets were not twice its liabilities. As a result, the debenture holders have been damaged in the sum of $4,298,200 (the full face amount of the outstanding debentures). Plaintiff, "on behalf of" the debenture holders, seeks judgment in that amount.

The question is whether plaintiff, the Debtor's reorganization trustee, has standing to maintain this action on behalf of the debenture holders. *Clarke* v. *Chase National Bank of City of New York*, 137 F. 2d 797 (2d Cir. 1943), which is squarely in point, answers this question in the negative. The Court of Appeals there held that such a

Opinion and Order of District Court Filed May 20, 1968, Granting Defendant's Motion to Dismiss the Complaint in 67 Civ. 1914, Mortimer M. Caplin, Trustee in Reorganization of Webb & Knapp, Inc., etc. v. The Marine Midland Grace Trust Company of New York

claim against an indenture trustee for failure to enforce a negative covenant made by the Debtor was a claim that is "personal to" the debenture holder. It held that the reorganization trustee had no title to the claim and could not maintain an action on it on behalf of the debenture holders. The order of the district court dismissing the action was affirmed, on the ground that the complaint did not state a claim and that the reorganization trustee was not the real party in interest.

This decision appears to be still the law in this circuit. I do not agree with plaintiff's contention that *Clarke* was overruled, *sub silentio*, by *Prudence-Bonds Corp.* v. *States Street Trust Co.*, 202 F. 2d 555 (2d Cir. 1953).

Plaintiff relies on *In re Solar Manufacturing Corporation*, 200 F. 2d 327 (3d Cir. 1952), *cert. denied*, 345 U.S. 940 (1953), which reached a contrary result. The court in *Solar* purported to distinguish *Clarke* on the ground that in *Clarke* the reorganization trustee had asserted the claim in a plenary action (as he does in the present case), whereas in *Solar*, the claim was asserted by the reorganization trustee by way of a counterclaim to an account filed by the indenture trustee of its doings as such indenture trustee and to a proof of claim filed by the indenture trustee for its services.

In my opinion, the difference in the form of the proceeding does not require or permit a difference in result on the substantive issue of the standing of the reorganization trustee to seek affirmative relief. Unless the factual situation in *Solar* can be said to be sufficiently different from that in *Clarke* to justify a distinction between the two cases

Opinion and Order of District Court Filed May 20, 1968, Granting Defendant's Motion to Dismiss the Complaint in 67 Civ. 1914, Mortimer M. Caplin, Trustee in Reorganization of Webb & Knapp, Inc., etc. v. The Marine Midland Grace Trust Company of New York

on the merits, then the decisions in *Solar* and *Clarke* are in conflict.

Defendant argues that there is such a factual difference. This seems to me improbable, but it is unnecessary to decide that question. There is no distinction between *Clarke* and the present case, and if it be assumed that *Clarke* and *Solar* are conflicting, then it is the clear duty of this court to follow *Clarke* as the controlling decision in this circuit.

Plaintiff's contention that *Clarke* is wrong and that the dissenting opinion in that case presents the correct view is an argument which is not open to plaintiff in this court. Similarly, plaintiff's arguments based on matters of policy and upon the legislative history of the Bankruptcy Act are arguments which can properly be made only to the Court of Appeals. Only the Court of Appeals can decide whether or not *Clarke* is to be overruled.

Defendant's motions are granted. The action is dismissed.

So ordered.

Dated: May 20, 1968

EDWARD C. McLEAN
U.S.D.J.

Opinion of District Court Filed May 20, 1968 Granting the Motion of Marine Midland Grace Trust Company of New York to Dismiss the Trustee's Counterclaim and Denying Marine Midland Grace Trust Company of New York's Motion to Strike the Trustee's Objection to the Proof of Claim

Paper #472
U. S. District Court
Filed
May 20, 1968
S. D. of N. Y.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

65 B 365

In the Matter

of

WEBB & KNAPP, INC., et al.,

Debtors.

MOTION OF MARINE MIDLAND GRACE TRUST COMPANY OF NEW YORK TO DISMISS THE OBJECTION AND COUNTERCLAIM OF THE DEBTOR'S TRUSTEE

McLEAN, *D. J.*

This motion by Marine Midland Grace Trust Company of New York (Marine Midland) involves the question which was presented by defendant's motion to dismiss the action entitled *Caplin, Trustee in Reorganization of Webb &*

Opinion of District Court Filed May 20, 1968 Granting the Motion of Marine Midland Grace Trust Company of New York to Dismiss the Trustee's Counterclaim and Denying Marine Midland Grace Trust Company of New York's Motion to Strike the Trustee's Objection to the Proof of Claim

Knapp, Inc., etc. v. *The Marine Midland Grace Trust Company of New York*, 67 Civ. 1914, a motion which I have granted by opinion filed today.

Caplin v. *Marine Midland* was a plenary action which the reorganization trustee of the debtor sought to maintain on behalf of debenture holders to recover damages which the debenture holder allegedly suffered by reason of the failure of Marine Midland, as indenture trustee, to enforce a negative covenant made by the debtor for the benefit of the debenture holders. The nature of this covenant is explained in the *Caplin* opinion. That explanation need not be repeated here.

In the present case the same question has been raised in the Chapter X reorganization proceeding of the debtor. Marine Midland filed a proof of claim in the Chapter X proceeding in the sum of $51,447.55 for compensation for its services as indenture trustee. The reorganization trustee of the debtor subsequently filed an "objection" to this claim. The reorganization trustee took the position that Marine Midland is not entitled to compensation as indentrue trustee because it failed to enforce the negative covenant. The allegations of this objection are substantially identical with those of the complaint in the *Caplin* action.

In addition, the reorganization trustee realleged all these allegations as a counterclaim "on behalf of the holders of the outstanding debentures" to recover damages in the sum of $4,298,200 which the debenture holders have allegedly suffered by reason of Marine Midland's failure to enforce the negative covenant.

Marine Midland now moves to dismiss the counterclaim on the same grounds upon which it moved to dismiss the

Opinion of District Court Filed May 20, 1968 Granting the Motion of Marine Midland Grace Trust Company of New York to Dismiss the Trustee's Counterclaim and Denying Marine Midland Grace Trust Company of New York's Motion to Strike the Trustee's Objection to the Proof of Claim

Caplin action, *ie.*, that the counterclaim fails to state a claim and that the reorganization trustee is not the real party in interest, plus the additional ground that the bankruptcy court does not have summary jurisdiction to determine the counterclaim. Marine Midland also moves to strike the objection on the ground that it is "an insufficient defense to Marine Midland's proof of claim."

The motion addressed to the counterclaim must be granted. As it pointed out in the court's opinion dismissing the *Caplin* action, *Clarke* v. *Chase National Bank of City of New York*, 137 F. 2d 797 (2d Cir. 1943), a decision binding upon this court, held that a reorganization trustee has no standing to maintain a plenary action on behalf of debenture holders to recover damages allegedly sustained by them by reason of the failure of an indenture trustee to enforce a negative covenant made by the debtor for the benefit of the debenture holders. It necessarily follows that the reorganization trustee has no standing to seek precisely the same affirmative relief, on the same grounds, by way of counterclaim. According to *Clarke*, it is the debenture holders, not the reorganization trustee, who own the claim and hence it is only the debenture holders who may sue on it. To the extent that *In re Solar Manufacturing Corporation*, 200 F. 2d 327 (3d Cir. 1952), *cert. denied*, 345 U. S. 940 (1953), drew a distinction between enforcing a claim by independent action and enforcing it by counterclaim, I do not feel at liberty to follow that decision.

In view of this conclusion it is unnecessary to consider the separate question as to whether the bankruptcy court has summary jurisdiction over the counterclaim.

Opinion of District Court Filed May 20, 1968 Granting the Motion of Marine Midland Grace Trust Company of New York to Dismiss the Trustee's Counterclaim and Denying Marine Midland Grace Trust Company of New York's Motion to Strike the Trustee's Objection to the Proof of Claim

The reorganization trustee's "objection," which in substance amounts to an alleged affirmative defense to Marine Midland's proof of claim, presents a different situation. In opposing Marine Midland's claim, the reorganization trustee is acting, not solely on behalf of the debenture holders, but on behalf of all persons interested in the estate. In this instance Marine Midland is not defending itself against a claim asserted against it on behalf of the debenture holders. It is seeking to recover money for itself. The services for which Marine Midland asks compensation were services rendered by it for the benefit of the debenture holders. Marine Midland's claim necessarily presupposes that it has fully performed its obligations to the debenture holders. If it has not, if it has failed to protect their interests in the manner required by the indenture, it would not be entitled to compensation from the debenture holders.

Marine Midland seeks to recover compensation in this instance from the estate, rather than from the debenture holders, because the indenture provides that the debtor will pay the trustee's compensation for its services. But if Marine Midland is not entitled to compensation from the debenture holders because of its nonperformance of its obligations, it follows that it cannot recover from the debtor either. Thus, Marine Midland's alleged nonperformance is a valid defense, on its face, to Marine Midland's claim.

Marine Midland is attempting to enforce its claim against the debtor's estate. The reorganization trustee, who represents the estate, has standing to resist the claim. If its resistance turns out to be successful, all persons interested in the estate, not merely the debenture holders, will benefit. *Clarke* does not apply in this situation.

Opinion of District Court Filed May 20, 1968 Granting the Motion of Marine Midland Grace Trust Company of New York to Dismiss the Trustee's Counterclaim and Denying Marine Midland Grace Trust Company of New York's Motion to Strike the Trustee's Objection to the Proof of Claim

There can be no question, nor does Marine Midland raise any, about the jurisdiction of the bankruptcy court to determine claims against the debtor's estate.

Marine Midland's motion to dismiss the reorganization trustee's counterclaim is granted. Its motion to strike the reorganization trustee's objection is denied.

Settle order on notice.

/s/ EDWARD C. McLEAN
U. S. D. J.

Dated: May 20, 1968

Opinion of District Court Filed May 22, 1968 Denying the Trustee's Motion to Compel Marine Midland Grace Trust Company of New York to Account

#34822
paper #474
U. S. District Court
filed
May 22, 1968
4:30 P. M.
S. D. of N. Y.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

65 B 365

IN THE MATTER

of

WEBB & KNAPP, INC., and subsidiaries,

Debtors.

APPLICATION OF THE TRUSTEE FOR AN ORDER COMPELLING MARINE MIDLAND GRACE TRUST COMPANY OF NEW YORK TO ACCOUNT FOR ITS ACTS AS INDENTURE TRUSTEE

McLEAN, D. J.

By order No. 100 dated April 27, 1967, this court granted the application of the trustee of the Debtor to begin a plenary action against Marine Midland Grace Trust Company of New York (Marine Midland), trustee under an indenture relating to 5 per cent debentures of the Debtor due June 1, 1974, to recover damages allegedly sustained by

Opinion of District Court Filed May 22, 1968 Denying the Trustee's Motion to Compel Marine Midland Grace Trust Company of New York to Account

the debenture holders by virtue of Marine Midland's failure to enforce a negative covenant contained in the indenture. The order also authorized the Debtor's trustee to assert the same claim against Marine Midland by way of counterclaim to the claim filed in the reorganization proceeding by Marine Midland for compensation for its services as indenture trustee. The court reserved decision upon a third application made by the Debtor's trustee at that time, an application to require Marine Midland to account to this court for its acts as indenture trustee.

Thereafter the Debtor's trustee began the plenary action, entitled *Mortimer M. Caplin, Trustee in Reorganization of Webb & Knapp. Inc., etc.* v. *The Marine Midland Grace Trust Company of New York,* 67 Civ. 1914. The Debtor's trustee also asserted the same claim by setting up a counterclaim to the proof of claim for compensation filed by Marine Midland in the reorganization proceeding. Marine Midland moved to dismiss both the plenary action and the counterclaim. By opinions dated May 20, 1968, the court has granted those motions on the authority of *Clarke* v. *Chase National Bank of City of New York,* 137 F. 2d 797 (2d Cir. 1943). The court permitted the Debtor's trustee, however, to assert the claim as a defense to Marine Midland's claim for compensation.

This memorandum is devoted to the question as to which decision was previously reserved, *i.e.,* whether Marine Midland should now be required to account. Assuming that the court has power to make such a direction, the court sees no valid reason for exercising that power at this time.

Marine Midland is still acting as indenture trustee for the debenture holders. It has filed a proof of claim on their behalf in the reorganization proceeding. It has not

resigned, nor has it indicated any intention or desire to resign.

There is no claim here that Marine Midland has in any way mishandled any funds which have come into its hands as indenture trustee. The only claim which the Debtor's trustee has asserted against it is that in the years prior to the Debtor's bankruptcy, it failed to enforce the negative covenant in the indenture. It is apparent that the real reason why the Debtor's trustee requests that Marine Midland be required to account is the fact that the Debtor's trustee believes that he might have standing to assert this claim as a counterclaim to an account, even if he has no standing to assert it by a counterclaim to Marine Midland's claim for services or by independent action.

> *See In re Solar Manufacturing Corporation*, 200 F. 2d 327 (3rd Cir. 1952), *cert. denied*, 345 U.S. 940 (1953).

This belief is not well founded, as long as *Clarke* continues to be the law in this circuit. Since the reorganization trustee has no title to the claim of the debenture holders for damages for the nonperformance by Marine Midland of its duty to enforce the negative covenant, the Debtor's trustee, under the *Clarke* rule, may not sue on that claim. It can make no difference that affirmative relief is sought by counterclaim rather than by independent action, or that the counterclaim is interposed to an account rather than to a claim for services. Hence to require an account from Marine Midland would not accomplish the purpose which the Debtor's trustee has in mind.

It is suggested that Marine Midland's personal interest is in conflict with the interest of the debenture holders. This amounts to a claim that Marine Midland should be

Opinion of District Court Filed May 22, 1968 Denying the Trustee's Motion to Compel Marine Midland Grace Trust Company of New York to Account

removed as indenture trustee, although no such relief is requested in the moving papers.

The suggestion of conflict of interest seems to the court to be far-fetched. Marine Midland initiated this Chapter X proceeding. It asserts that it has acted throughout in accordance with its obligations under the indenture. Obviously, there is no conflict between this position and its continued representation of the bondholders. And even if this court should eventually sustain the Debtor's trustee's objection to Marine Midland's claim for compensation on the ground that Marine Midland failed to enforce the negative covenant prior to the Debtor's bankruptcy, it does not necessarily follow that Marine Midland cannot properly represent the debenture holders in the reorganization proceeding. It would be unjust to remove Marine Midland merely because an objection has been made to its conduct prior to the bankruptcy, an objection which as yet has not been proved. The court sees no probability of injury to the bondholders by permitting Marine Midland to continue to represent them in the meantime, at least until that question is resolved.

Accordingly, the Debtor's trustee's motion to compel Marine Midland to account is denied.

Settle order on notice.

Dated: May 22, 1968

EDWARD MCLEAN

.....

U.S.D.J.

Order of District Court Filed June 7, 1969 Denying the Trustee's Motion to Compel Marine Midland Grace Trust Company of New York to Account

Filed
June 7, 1968

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Order No. 132, 65-B-365

In Proceedings for the Reorganization of Corporations

In the Matter

of

WEBB & KNAPP, INC., and subsidiaries,

Debtors.

MORTIMER M. CAPLIN, Trustee in Reorganization of the debtors, having moved for an order to compel an accounting by Marine Midland Grace Trust Company of New York, and said motion having come on regularly to be heard, and argument being had thereon, and the Court having made its decision in writing and due deliberation having been had, it is on motion of Sullivan & Cromwell, attorneys for Marine Midland Grace Trust Company of New York,

ORDERED, that the motion of the Trustee in Reorganization to compel Marine Midland Grace Trust Company of New York to account is denied.

Dated: New York, New York
June 7, 1968

EDWARD C. McLEAN
U.S.D.J.

Order of District Court Filed June 7, 1967 Granting Motion of Marine Midland Grace Trust Company of New York to Dismiss Counterclaim and Denying the Motion to Strike the Trustee's Objection to the Proof of Claim of Marine Midland Grace Trust Company of New York

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Order No. 133, 65-B-365

Filed
June 7, 1968

In Proceedings for the Reorganization of Corporations

In the Matter

of

WEBB & KNAPP, INC., *et al.*,

Debtors.

MARINE MIDLAND GRACE TRUST COMPANY OF NEW YORK having moved for an order pursuant to Rules 12(b)(6), 12(b)(1) and 17(a) of the Federal Rules of Civil Procedure dismissing the counterclaim asserted in the Objection by Trustee to Allowance of Claim and Counterclaim filed herein and for an order pursuant to Rule 12(f) of the Federal Rules of Civil Procedure striking the objection asserted therein, and argument being had thereon, and the Court having made its decision in writing and due deliberation having been had, it is, on motion of Sullivan & Cromwell, attorneys for Marine Midland Grace Trust Company of New York

Order of District Court Filed June 7, 1967 Granting Motion of Marine Midland Grace Trust Company of New York to Dismiss Counterclaim and Denying the Motion to Strike the Trustee's Objection to the Proof of Claim of Marine Midland Grace Trust Company of New York

ORDERED, that the motion to dismiss the counterclaim is granted, and the counterclaim is hereby dismissed, and it is further

ORDERED, that the motion to strike the objection is denied.

Dated: New York, New York
June 7, 1968

EDWARD C. McLEAN

U. S. D. J.

Notice of Appeal in 67 Civ. 1914, *Mortimer M. Caplin, Trustee in Reorganization of Webb & Knapp, Inc., etc.* v. *The Marine Midland Grace Trust Company of New York*, from order of District Court, Filed May 20, 1968, Dismissing Complaint

Filed:
June 13, 1968

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

67 Civ. 1914

MORTIMER M. CAPLIN, Trustee in Reorganization of WEBB & KNAPP, INC., on behalf of debentureholders under a trust indenture of Webb & Knapp, Inc. to The Marine Midland Trust Company of New York, trustee, dated as of June 1, 1954,

Plaintiff,

against

THE MARINE MIDLAND GRACE TRUST COMPANY OF NEW YORK,

Defendant.

Sirs:

PLEASE TAKE NOTICE that Mortimer M. Caplin, Trustee in Reorganization of Webb & Knapp, Inc., as Trustee, and on behalf of debentureholders under a trust indenture of Webb & Knapp, Inc. to The Marine Midland Trust Company of New York, trustee, dated as of June 1, 1954, hereby appeals to the United States Court of Appeals for the Second Circuit from the Order of Judge Edward C. Mc-

Notice of Appeal in 67 Civ. 1914, Mortimer M. Caplin, Trustee in Reorganization of Webb & Knapp, Inc., etc. v. The Marine Midland Grace Trust Company of New York, from Order of District Court, Filed May 20, 1968, Dismissing Complaint

Lean, made and entered on the 20th day of May, 1968, in the United States District Court for the Southern District of New York, which dismisses his complaint.

Dated: New York, New York
June 12, 1968

MARSHALL, BRATTER, GREENE,
ALLISON & TUCKER
Attorneys for Plaintiff
430 Park Avenue
New York, New York 10022

To:

SULLIVAN & CROMWELL, Esqs.
Attorneys for Defendant
48 Wall Street
New York, New York 10005

CLERK
United States District Court
Southern District of New York

Notice of Appeal in 65-B-365 from Order of District Court, Entered June 7, 1968, Denying Trustee's Motion to Compel Marine Midland Grace Trust Company of New York to Account

Filed:
June 13, 1968

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

No. 65-B-365

In Proceedings for the Reorganization of Corporations

In the Matter

of

WEBB & KNAPP, INC. and Subsidiaries,

Debtors.

Sirs:

PLEASE TAKE NOTICE that Mortimer M. Caplin, Trustee in Reorganization of Webb & Knapp, Inc., hereby appeals to the United States Court of Appeals for the Second Circuit from so much of the Order of Judge Edward C. McLean, made and entered on the 7th day of June, 1968, in the United States District Court for the Southern District of New York, which denies the motion of Mortimer M. Caplin, Trustee in Reorganization of Webb & Knapp, Inc., to compel The Marine Midland Trust Company of

Notice of Appeal in 65-B-365 from Order of District Court, Entered June 7, 1968, Denying Trustee's Motion to Compel Marine Midland Grace Trust Company of New York to Account

New York to account as indenture trustee under a trust indenture of Webb & Knapp, Inc. to The Marine Midland Trust Company of New York dated as of June 1, 1954.

Dated: New York, New York
June 12, 1968

MARSHALL, BRATTER, GREENE,
ALLISON & TUCKER.
Attorneys for Trustee
430 Park Avenue
New York, New York 10022

To:

SULLIVAN & CROMWELL, Esqs.
Attorneys for The Marine Midland Grace
Trust Company of New York
48 Wall Street
New York, New York 10005

CLERK
United States District Court
Southern District of New York

Notice of Appeal in 65-B-365 from Order of District Court, Entered June 7, 1968, Granting Motion of Marine Midland Grace Trust Company of New York to Dismiss the Counterclaim of Trustee

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

No. 65-B-365

In Proceedings for the Reorganization of Corporations

In the Matter

of

WEBB & KNAPP, INC. and Subsidiaries,

Debtors.

Sirs:

PLEASE TAKE NOTICE that Mortimer M. Caplin, Trustee in Reorganization of Webb & Knapp, Inc., as Trustee, and on behalf of debentureholders under a trust indenture of Webb & Knapp, Inc. to The Marine Midland Trust Company of New York, trustee, dated as of June 1, 1954, hereby appeals to the United States Court of Appeals for the Second Circuit from the Order of Judge Edward C. McLean, made and entered on the 7th day of June, 1968, in the United States District Court for the Southern District of New York, granting the motion of The Marine Midland Grace Trust Company of New York and dismissing the

Notice of Appeal in 65-B-365 from Order of District Court, entered June 7, 1968, Granting Motion of Marine Midland Grace Trust Company of New York to Dismiss the Counterclaim of Trustee

counterclaim of Mortimer M. Caplin as Trustee in the Reorganization of Webb & Knapp, Inc.

Dated: New York, New York
June 12, 1968

MARSHALL, BRATTER, GREENE, ALLISON & TUCKER
Attorneys for Trustee
430 Park Avenue
New York, New York 10022

To:

SULLIVAN & CROMWELL, Esqs.
Attorneys for The Marine Midland Grace Trust Company of New York
48 Wall Street
New York, New York 10005

CLERK
United States District Court
Southern District of New York

Notice of Cross-Appeal by Marine Midland Grace Trust Company of New York in 65-B-365 from the Order of District Court, Entered June 7, 1968 Denying Motion to Strike the Trustee's Objection to the Proof of Claim of Marine Midland Grace Trust Company of New York

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

No. 65-B-365

In Proceedings for the Reorganization of Corporations

In the Matter

of

WEBB & KNAPP, INC. and Subsidiaries,

Debtors.

Sirs:

PLEASE TAKE NOTICE that Marine Midland Grace Trust Company of New York hereby cross-appeals to the United States Court of Appeals for the Second Circuit from that part of the Order of Judge Edward C. McLean, made and entered on the 7th day of June, 1968, in the United States District Court for the Southern District of New York which denied the motion of Marine Midland Grace Trust Company of New York to strike the objection by Mortimer M. Caplin, Trustee in Reorganization of Webb & Knapp, Inc., to the

Notice of Cross-Appeal by Marine Midland Grace Trust Company of New York in 65-B-365 from the Order of District Court, Entered June 7, 1968 Denying Motion to Strike the Trustee's Objection to the Proof of Claim of Marine Midland Grace Trust Company of New York

proof of claim of Marine Midland Grace Trust Company of New York.

Dated: New York, New York
July 2, 1968

SULLIVAN & CROMWELL
Attorneys for Marine Midland
Grace Trust Company of New
York
48 Wall Street
New York, New York 10005

To:

MARSHALL, BRATTER, GREENE, ALLISON
& TUCKER
Attorneys for the Trustee
430 Park Avenue
New York, New York 10022

Judgment of the Court of Appeals, March 3, 1971, Affirming Orders of the District Court on Consolidated Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the third day of March one thousand nine hundred and seventy-one.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
HON. ROBERT P. ANDERSON,
Circuit Judges.

MORTIMER M. CAPLIN, Trustee in Reorganization of Webb & Knapp, Inc. on behalf of Debentureholders under a Trust Indenture of Webb & Knapp, Inc., to the Marine Midland Trust Company of New York,

Plaintiff-Appellant,

SECURITIES & EXCHANGE COMMISSION,

Intervenor,

v.

THE MARINE MIDLAND GRACE TRUST COMPANY OF NEW YORK,

Defendant-Appellee.

(AND THREE OTHER CASES)

Judgment of the Court of Appeals, March 3, 1971, Affirming Orders of the District Court on Consolidated Appeals

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the orders of said District Court be and they hereby are affirmed without costs in accordance with the opinion of this court.

A. DANIEL FUSARO
Clerk

Opinion of the Court of Appeals, March 3, 1971, on Consolidated Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 327—September Term, 1970.

(Argued December 16, 1970 Decided March 3, 1971.)

En Banc ordered January 13, 1971

Docket No. 32586

MORTIMER M. CAPLIN, Trustee in Reorganization of WEBB & KNAPP, INC., on behalf of debenture-holders under a trust indenture of Webb & Knapp, Inc. to The Marine Midland Trust Company of New York, trustee, dated as of June 1, 1954,

Plaintiff-Appellant,

v.

THE MARINE MIDLAND GRACE TRUST COMPANY OF NEW YORK,

Defendant-Appellee.

In the Matter of

WEBB & KNAPP, INC. and Subsidiaries, Debtors, MORTIMER M. CAPLIN, Trustee in Reorganization of WEBB & KNAPP, INC. and Subsidiaries,

Trustee-Appellant.

In the Matter of

WEBB & KNAPP, INC. and Subsidiaries, Debtors, MORTIMER M. CAPLIN, Trustee in Reorganization of WEBB & KNAPP, INC. and Subsidiaries,

Trustee-Appellant.

In the Matter of

WEBB & KNAPP, INC. and Subsidiaries, Debtors, THE MARINE MIDLAND GRACE TRUST COMPANY OF NEW YORK,

Claimant-Appellant.

Opinion of the Court of Appeals, March 3, 1971, on Consolidated Appeals

Before:

LUMBARD, *Chief Judge*,
MOORE, FRIENDLY, SMITH, KAUFMAN, HAYS
and ANDERSON, *Circuit Judges*.*

FRIENDLY, *Circuit Judge*:

We have three appeals and a cross-appeal from orders of Judge McLean concerning the reorganization of Webb & Knapp, Inc. under Chapter X of the Bankruptcy Act which is now pending in the District Court for the Southern District of New York. All relate to complaints by the Chapter X Trustee, Mortimer M. Caplin, concerning alleged failure on the part of The Marine Midland Grace Trust Company of New York ("Marine"), trustee under an Indenture whereunder Webb & Knapp issued unsecured debentures now outstanding in the amount of $4,398,200, to enforce certain covenants made by the debtor.[1]

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* Judge Feinberg took no part in the consideration or decision of this case.

[1] The breach concerns mainly, if not indeed solely, Section 3.6 of the Indenture. Webb & Knapp there covenanted that so long as any of the debentures remained outstanding, it would not incur or assume indebtedness resulting from borrowings or from the purchase of real property or interests in real property on which it would be personally liable, or to purchase any real property, or interests in real property, unless on the basis of computations (made as of the last day of the fourth month prior to such transaction) its "consolidated tangible assets" would equal 200% of certain liabilities. In determining "consolidated tangible assets" the Company was authorized, *inter alia*, to rely on and use appraisals made by its officers and approved by the Board of Directors "of real property, of interests in real property . . . or of the controlling stock interest in any corporation the principal assets of which consist of real property or interests in real property." The Company was required to file a certificate of compliance annually with Marine. In addition to such certificates Marine requested, as permitted by the

Marine had filed a proof of claim in the sum of $51,447.55 for services rendered and expenses incurred by it as indenture trustee. The Chapter X Trustee objected to this on the ground of Marine's alleged breach of duty and counterclaimed for damages in the amount of the debentures that remained outstanding. With the authorization of the district court, he also filed a plenary suit seeking the same relief. In addition he moved that Marine be required to file an accounting. Marine moved to dismiss the objections to its proof of claim, the counterclaim and the plenary suit. The judge held that grant of Marine's motions to dismiss the counterclaim and the complaint was required by *Clarke* v. *Chase Nat'l Bank*, 137 F.2d 797 (2 Cir. 1943), but denied its motion to dismiss the objections. He also denied the Trustee's motion to compel Marine to account since there was no allegation that Marine had mishandled any funds which came into its hands as indenture trustee, and the only claim asserted by the Chapter X Trustee was the indenture trustee's alleged failure to enforce the negative covenant, a claim that would stand no better as a counterclaim to an accounting than as a plenary action or as a counterclaim to a proof of claim. Each party appealed from the decisions adverse to it.

After a panel consisting of Judges Moore, Kaufman and Hays had come to the conclusion that *Clarke* should be overruled, the court voted, in accordance with its usual practice in such cases, see *e.g. Indussa Corp.* v. *S.S. Ran-*

Indenture, and received separate officers' certificates stating specifically that Webb & Knapp was not in violation of § 23.6. In accordance with § 315 of the Trust Indenture Act of 1939, 15 U.S.C. § 77000 § 10.1 of the Indenture required Marine to examine all reports furnished to it but authorized it, in the absence of bad faith, to rely upon certificates or opinions conforming to the requirements of the Indenture. The Chapter X Trustee claims that although the reports for 1959-63 showed asset-liability ratios ranging from a high of 258.30 in 1961 to a low of 200.56 in 1963, Marine should have known that the appraised values were inflated.

borg, 377 F.2d 200 (2 Cir. 1967), to consider the appeals *in banc* upon the briefs already filed. A majority of the full court have concluded that *Clarke* was correctly decided and, since this case is admittedly not distinguishable, that the dismissal of the counterclaim and the plenary suit should be affirmed. We are all of the view that the orders denying the Trustee's motion to require Marine to account and refusing to strike his objections to Marine's claim should be affirmed.

Clarke was an action by the Chapter X Trustee of Associated Gas and Electric Company (Ageco) against the Chase National Bank, trustee under an indenture for debenture holders. Broadly speaking the complaint contained two differing sets of counts. The first and third alleged that Chase, in breach of its duties as indenture trustee, had failed to enforce certain covenants against the mortgage or pledge of Ageco's property or its merger into another corporation and sought to recover losses suffered by the debenture holders in consequence. The second count sought recovery of $4,000,000 allegedly received by Chase from Ageco in payment of an indebtedness, though Chase knew the latter was insolvent or in imminent danger of insolvency; the fourth count alleged that Chase had received a preference in respect of $4,249,000 of Ageco debentures owned by Chase, through an unfair exchange with Ageco's subsidiaries of these debentures for securities of greater value, at a time when Chase knew Ageco was insolvent.[2] The court unanimously reversed an order dismissing the second and fourth counts. A majority, with Judge Augustus N. Hand writing for himself and Judge Chase, upheld an order of a different judge dismissing the first and third counts; as to this Judge Learned Hand dissented.

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[2] A fifth count sought to recover $40,000 that had been paid Chase as trustee's fees, which the district court had dismissed with leave to amend; the court dismissed the appeal from this order for lack of appellate jurisdiction, 137 F.2d at 801.

Opinion of the Court of Appeals, March 3, 1971, on Consolidated Appeals

The majority in *Clarke* reasoned that, assuming liability, "we cannot see that the claims for breach of the covenants are any part of the property of the bankrupt or would affect the plan of reorganization"; they were rather claims "of the debenture-holders not derived from the bankrupt's estate but arising through the alleged tortious action of the indenture trustee." 137 F.2d at 800. They cited the earlier decisions in *In re 1775 Broadway Corp.*, 79 F.2d 108 (2 Cir. 1935), that the reorganization court has no jurisdiction to force nonassenting noteholders to release claims against an indenture trustee for misrepresentation in the sale of the notes, since these were not claims against the debtor or its assets or claims that must be settled to bring property into the reorganized company, and in *In re Nine North Church Street, Inc.*, 82 F.2d 186 (2 Cir. 1936), that the reorganization court has no jurisdiction to enjoin nonassenting certificate holders from suing the guarantor of a mortgage on the debtor's property since the suit was to enforce a personal right against the guarantor and did not concern property subject to reorganization. Judge Learned Hand argued that the indenture trustee had a duty to prevent the violation of the covenants in the indenture, 137 F.2d at 802, which was true enough, and then asked "In what way does that [breach of duty] differ from allowing a debtor, in violation of the mortgage, to substitute improper collateral?" The answer was that in the latter case the mortgage trustee would have dealt improperly with property of the bankrupt. Judge L. Hand himself had based his opinion in *Central Hanover Bank & Trust Co.* v. *President and Directors of Manhattan Co.*, 105 F.2d 130, 131-32 (2 Cir. 1939), on the ground that there the accounting dealt with property of the debtor which trustees for secured creditors had allegedly surrendered in breach of the trust, and that the rights of the creditors to compel them to restore the *res* was within the "extended"

concept of the debtor's property in a reorganization.[3] He was there careful, however, to distinguish the case in which the creditors asserted rights having "nothing to do with the *res* and [which] would not restore it" and "had nothing to do with anything that had ever been the debtor's property, or with the distribution of any part of it." *Id.* at 132. This distinction, apparently lost sight of in his dissent in *Clarke,* had been further developed by Judge Frank in *Brooklyn Trust Co.* v. *Kelby,* 134 F.2d 105, 110-12, 116 (2 Cir.), *cert. denied,* 319 U.S. 767 (1943).

A year and a half after *Clarke,* a panel consisting of the three other judges of the court as it then stood, Swan, Clark and Frank, decided the complicated case of *President and Directors of Manhattan Co.* v. *Kelby,* 147 F.2d 465 (2 Cir. 1944), *cert. denied,* 324 U.S. 866 (1945). The unanimous opinion was written by Judge Frank, who had long been expert in reorganization matters and was a member of the SEC when Chapter X was adopted, in no small measure at its instance. The court took a broad view of the rights of reorganization trustees against a trustee under an indenture but stopped when it came to an issue similar to that here presented. One of the claims of the Chapter X Trustees was that the indenture trustee was liable in damages for failing to enforce a covenant of Prudence-Bonds Corporation to deposit a guarantee by the Prudence Company. Although recognizing that such damages might be considerable, the court held that "an action for those damages is not one for restoration of the [trust] fund" and "cannot be maintained in connection with the bankruptcy proceedings," 147 F.2d at 478, citing *Brooklyn Trust Co.* v. *Kelby, supra,* 134 F.2d at 111.

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[3] The "extension" was that in some instances the Chapter X trustee may be able to recover property of the company which the debtor, because it might be barred by a defense of consent or estoppel, could not. See *McCandless* v. *Furlaud,* 296 U.S. 140, 159-61 (1935).

It is with this background that we come to *Prudence-Bonds Corp.* v. *State Street Trust Co.*, 202 F.2d 555, 558 (2 Cir.) *cert. denied*, 346 U.S. 835 (1953), more particularly to Judge Learned Hand's opinion on rehearing. The Chapter X Trustee regards this as fundamentally inconsistent with *Clarke*, which the opinion did not mention. In our view the reason for failing to mention *Clarke* was that for grounds clearly stated by Judge Hand, there was no inconsistency.

The holdings in *Prudence-Bonds* with which we are concerned were (1) that the Chapter X Trustees could have maintained an action against an indenture trustee for failure to enforce a "Secondary Guaranty" by the Prudence Company of mortgages held by the indenture trustee as security for the bondholders, and (2) that this right had been conveyed to the reorganized company. Indeed it is only the first holding that is of real interest here. Its justification was thus stated, 202 F.2d at 561:

> But by the Secondary Guaranty the Guarantor became a surety for the performance of the mortgagors, just as the mortgages were a surety for the same performance. The only difference between them was that in one case the security was the promise of a third person and in the other it was a lien upon property. The promise was a part of the *res* in precisely the same sense that the promises were in the policies of fire and title insurance, mentioned in Article 1, § 2. As we have said, it was in effect the equivalent of a policy of credit insurance of the mortgagors.

The significance of this was heightened by the distinction drawn between the indenture trustee's failure to enforce the "Secondary Guaranty" and the "Primary Guaranty," i.e., a guarantee by the Prudence Company of the bonds of Prudence-Bonds themselves. While the court said it

"need not answer" the question whether this "was also a part of the *res*," the opinion in effect did so when it said that this "was a promise to pay the Debtor's obligations, and had nothing to do with the *res*." *Id.* It was the Primary Guaranty which was like the claim sought to be pressed in *Clarke*, and here.[4] Far from being indistinguishable, as the dissent claims, *Prudence-Bonds* differs from this case and from *Clarke* on the very ground Judge Hand was at such pains to clarify. If Marine had held property of Webb & Knapp through pledge or, for example, as a result of payments into a sinking fund, the Chapter X Trustee could sue under *Prudence-Bonds* for mismanagement of such assets, since he would be asserting a claim to property of the debtor which the indenture trustee had held. Here, as in *Clarke*, he is not. The difference between failure to enforce a third party's guaranty of a mortgage assigned to an indenture trustee or other property held by it as security and failure to enforce a promise by the debtor is the highly significant one that the former has diminished the debtor's estate and the latter has not.

The collapse of the argument of the Chapter X Trustee based on *Prudence-Bonds* does not, of course, mean that we could not overrule *Clarke* if we were convinced that Judges Augustus Hand and Chase had been in error. But we are not.

It is necessary in the first instance to consider what effect a recovery by the Chapter X Trustee would have

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[4] We do not regard *In re Solar Mfg. Corp.*, 200 F.2d 327 (3 Cir. 1952), *cert. denied sub nom. Marine Midland Trust Co.* v. *McGirl*, 345 U.S. 940 (1953), as in conflict with *Clarke*. Although we would not be persuaded by the procedural distinction made at p. 332 n. 6, the counterclaim against the Indenture trustee there sustained was for failure to earmark $450,000 it had received upon the sale of certain of the debtor's property. Since the claim was for failure to keep funds of the debtor which the indenture trustee was bound to hold in trust, the court concluded that the cause of action was "quasi in rem for the benefit of the trust" and "for the restoration of trust funds." *Id.* at 332.

on the reorganization. On a superficial view this might seem substantial—if, for example, the Chapter X Trustee were to achieve a complete recovery, the debenture holders would be paid off and it might seem there would be that much more for the other creditors and the stockholders. But this pleasant prospect speedily evaporates when the law of subrogation is brought into play. As a result of subrogation, Marine would simply be substituted for the debenture holders as the claimant. Cf. ALI, Restatement of Security § 141 (1941). If the Chapter X Trustee recovered judgment in a lesser amount, the claim of the debenture holders would still be provable in full, with the division of the proceeds between them and Marine dependent upon the results of the reorganization, and other creditors or stockholders would not be affected. Indeed, even these hypotheticals put the case too favorably for the Chapter X Trustee, since we do not see the answer to Judge A. N. Hand's observation in *Clarke, supra*, 137 F.2d at 800.

> Each creditor, including the debenture-holders, can prove the full amount of his claim, and only to the extent that a debenture-holder fails to satisfy it from the bankruptcy estate will he suffer a loss which he can assert against the defendant through its failure to enforce the negative covenants.

The claim against Marine thus could not be prosecuted to judgment until the results of the reorganization become known.[5]

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[5] Caplin argues that failure to allow suit by him would leave the debenture holders without remedy against Marine as a practical matter, since under *Elkind* v. *Chase Nat'l Bank*, 259 App. Div. 661, 20 N.Y.S. 2d 213 (1st Dept.), *aff'd* 284 N.Y. 726 (1940), each would have to sue individually. Apart from other possibilities under F.R. Civ. P. 23, we would not regard it as unlikely that a class action could be maintained in federal court for violation of § 315 of the Trust Indenture Act of 1939, although, of course, we are not to be understood as so deciding.

Equally important to the *Clarke* decision was the necessity, 137 F.2d at 801, under F. R. Civ. P. 17(a), here applicable by virtue of General Order in Bankruptcy 37, that "Every action shall be prosecuted in the name of the real party in interest." To determine whether Caplin has that status, we look to the Bankruptcy Act.

Sections 186 and 187 provide that a Chapter X trustee "shall be vested with the same rights, be subject to the same duties, and exercise the same powers as a trustee appointed under section 44 of this Act, and, if authorized by the judge, shall have and may exercise such additional rights and powers as a receiver in equity would have if appointed by a court of the United States for the property of the debtor." Section 70a vests a trustee appointed under § 44 "with the title of the bankrupt" to eight types of property therein described. None of these, by the remotest stretch of language or even of imagination, could include the claims of debenture holders against an indenture trustee for permitting the debtor to violate covenants made by the debtor to the indenture trustee for the bondholders' protection. The bankruptcy trustee's task is to "collect and reduce to money the property of the estates for which they are trustees," § 47. While the reorganization trustee's added duty, § 167(3), to "report to the judge any facts ascertained by him pertaining to fraud, misconduct, mismanagement and irregularities, and to any causes of action available to the estate," may be broad enough to authorize him to report whether in his opinion an indenture trustee has failed in its duties to debenture holders and this may assist the latter in asserting their rights, nothing in the statute allows him to collect any moneys or other property not owed to or owned by the estate although, as indicated see fn. 3, he may sometimes be able to recover an insolvent corporation's property when the corporation itself might be subject to a defense of consent or estopped.

Any other view would, for example, allow a Chapter X Trustee to settle claims of debenture holders against third parties with the approval of the reorganization court, and would, in principle, sanction a plan of reorganization providing for a partial or even total release of such claims. Yet § 216(2) says that the plan "may deal with all or any part *of the property of the debtor*" (emphasis supplied) and § 216(13) directs that it "may include provisions for settlement or adjustment of *claims belonging to the debtor or to the estate*" (emphasis supplied). The debenture holders' claims against Marine simply do not fit under those rubrics.

The Reorganization Trustee relies heavily on statements from the legislative history of Chapter X, such as that in the House Report, H.R. Rep. 1409, 75th Cong., 1st Sess., pp. 43-44 (1937), that "There must be power and responsibility in the hands of a qualified representative of investors." It was exactly in this spirit that Chapter X was read in its early years by the judges who sat on this court in the 1940's, one of whom, as noted, had played no small role in its enactment. These were not judges who read statutes in the niggling way condemned by Mr. Justice Holmes, "We see what you are driving at, but you have not said it, and therefore we shall go on as before." *Johnson* v. *United States*, 163 F. 30, 32 (1 Cir. 1908). But they could find nothing in Chapter X, as we cannot, to indicate that Congress was "driving at" allowing a trustee to enforce claims not belonging to the estate. Now that the issue has again been raised after so many years, Congress may wish to consider whether it is possible and, if so, desirable to go further and permit the trustee to enforce individual claims of security holders against third parties.[6]

[6] An affirmative answer should not simply be assumed. Apart from possible question whether the bankruptcy power extends to claims of creditors against solvent third parties, which Congress might not think it worthwhile to raise, there would be serious prob-

That is a policy decision to be made by the legislature, not by our overruling soundly reasoned decisions of our distinguished predecessors, who knew the statute every bit as well as we do and construed it to mean what it rather clearly says. We therefore affirm Judge McLean's dismissal of the Chapter X Trustee's counterclaim and plenary suit.

We are all in accord with the decision of the panel to affirm the district court's denial of the Trustee's motion for an accounting. Although § 212 gives the reorganization court power to enforce an accounting under instruments whereby any one of a number of persons, including an indenture trustee "purports to represent any creditor or stockholder," this does not authorize the court to require an "accounting" by an indenture trustee when there is no claim that he holds property belonging to the debtor or any security holder, or has mishandled any such property in the past.

We likewise are in accord with the panel's decision affirming the denial of Marine's motion to strike the Chapter X Trustee's objections to its proof of claim. Marine claims it is entitled to be paid its pro-rata share out of the debtor's property for services it rendered as the indenture trustee, whereas Caplin contends it did not perform the services

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lems if other states have rules like that prevailing in New York before 1950 that transfer of a bond does not carry accrued claims against trustees or guarantors. See *Elkind* v. *Chase Nat'l Bank, supra*, 259 App. Div. 661, 20 N.Y.S.2d 213, *overruled in part by statute*, L. 1950 c. 812 N.Y. Personal Property Law § 41, 4, contracts. *Welch* v. *Northern Bank & Trust Co.*, 100 Wash. 349, 170 P. 1029 (1918), or when such claims had been reserved by agreement. With no showing that the *Clarke* decision had caused any real difficulty over the past twenty-seven years, Congress might well decide that it was best to adhere in the policy of allowing holders of the bonds of debtors in reorganization to pursue their own remedies against third parties.

it should have performed. We cannot say that the objection, if well founded in fact, would not be valid in law. As already indicated, even though the debtor corporation here might have been estopped to assert failure of consideration as a defense to the trustee's claim, as Marine argues, it does not follow that the reorganization trustee may not do so.[7]

The orders of the district court are affirmed. No costs.

KAUFMAN, *Circuit Judge* (with whom Judge Hays concurs), dissenting in part:

I see no justification for continued adherence to the long since eroded rule announced over Judge Learned Hand's vigorous dissent in *Clarke* v. *Chase Nat'l Bank*, 137 F.2d 797 (2 Cir. 1943). I would permit Caplin to assert his counter-claim and maintain the plenary action.

Indeed, Judge Hand himself in effect announced the demise of the *Clarke* rule in *Prudence-Bonds Corp.* v. *State Street Trust Co.*, 202 F.2d 555 (2d Cir. 1953), without saying so expressly. The plaintiff in *Prudence-Bonds*, like Caplin, sought redress on behalf of bondholders for the alleged default by the trustee of a bond indenture. The reorgazined corporation, successor to the reorganization trustee and proceeding pursuant to an order of the bankruptcy court, alleged that the indenture trustee had negligently failed to demand payment by a guarantor of a mortgage pledged to the indenture trustee as security for the bonds, following the mortgagee's default. Although at the time of the default and for a period thereafter the guarantor was solvent and presumably could have made good on its guarantee, the guarantor's insolvency followed close upon that of the debtor. Learned Hand, joined by

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[7] We need not consider whether a determination of the objection in favor of the Chapter X Trustee might enure to the benefit of the debenture holders in an action by them under the principle of *Zdanok* v. *Glidden Co.*, 327 F.2d 944 (2 Cir.), *cert. denied*, 377 U.S. 934 (1964).

Chief Judge Swan and Judge Frank, found that the broad authority of the reorganization court to implement a reorganization plan furnished ample authority for the newly reorganized corporation to assert before the bankruptcy court the liability of the indenture trustee "to the bondholders for any loss that resulted" from that trustee's alleged breach. *See* 11 U.S.C. §§ 621-29.

In its brief on appeal, Marine attempted to distinguish *Prudence-Bonds* in several respects, but each is inconsequential. The relevance of the assertion that Marine successfully opposed Caplin's application for an accounting by Marine or that Marine is not now seeking a release as trustee, escapes me altogether. Such considerations would seem to bear more on jurisdiction than standing. And the claim that the bondholders' interests here are unsecured, unlike those in *Prudence-Bonds*, is also of no moment. Moreover, I would not attribute to Congress the perverse purpose of permitting a bankruptcy court to authorize a corporation already reorganized to assert bondholders' claims against the indenture trustee, as in *Prudence-Bonds*, while denying it the power to dispose of those claims in more orderly fashion by permitting the trustee to raise them *before* the reorganization plan has jelled.

The majority concedes that *Prudence-Bonds* is indistinguishable in any of these respects, but suggests that it may be explained away on yet another ground. The opinion tells us that a Chapter X trustee may proceed against an indenture trustee for failure to enforce a guaranty *by a third party* that secures the trust, res, as in *Prudence-Bonds*, but not for failure to enforce a promise *by the debtor himself* contained in the trust indenture, as here, which also protects and secures the trust res. This anomalous result is said to be forced upon us because of language in Learned Hand's *Prudence-Bonds* opinion having nothing to do with that court's discussion of the standing problem.

But when a hypothesis as to a law's meaning is seen to yield such awkward conclusions, it is perhaps better to re-examine the hypothesis than to ascribe to Congress an intent to fashion so irrational a design. In this instance, the pressure to ascribe such an intent is very slight indeed. For in purporting to set forth the reasoning of the *Prudence-Bonds* court with respect to the standing problem, 202 F.2d 555 at 560, the majority relies entirely on dictum which occurs in the court's later analysis of the merits of the successor corporation's action against the trustee. 202 F.2d at 561. The finding of standing in *Prudence-Bonds* is not premised at all on this dictum, but rather "on the broad implementary powers of a judge when a plan is confirmed" and specifically on an order of the reorganization court permitting the new corporation to pursue "*any* objections" (emphasis added) to the indenture trustee's accounts "on its own behalf and on behalf of" the bondholders. There is no basis in the *Prudence-Bonds* opinion for limiting this langauge, which clearly would comprehend such an action as Caplin's, by transposing into the court's discussion of standing later dictum intended to bear—and even then incidentally and by way of speculation and musing—only on the merits of the new corporation's action, and not on its right to bring it.

In distinguishing *Prudence-Bonds* the majority is compelled to rely on dictum in the opinion irrelevant to the question presently before this court. But, we can understand this, for otherwise the majority would be required to show in detail why there should have been standing in *Prudence-Bonds* under the rationales that it advances to support its decision today. My brothers rightly conclude, and no one has asserted otherwise, that Caplin's claim against Marine could not "by the remotest stretch of language or even of imagination" be considered an action to "collect and reduce to money the property of the [estate] for which" Caplin is trustee, citing Section 47 of the

Bankruptcy Act. But it requires no lesser feat of linguistic gyration to conclude that the action in Prudence-Bonds was such an action. The action in *Prudence-Bonds* was one for an accounting for the loss to the bondholders, on behalf of the bondholders alone, that resulted from the indenture trustee's breach of a negative covenant, as here. It was not in any sense an action for restoration of the trust fund or the debtor's property (unless Caplin's action may also be so described). Indeed L. Hand specifically observed that "the breach was at most a failure properly to protect a part of the *res*"—which is precisely the situation here—"and not a 'surrender or release' " of the res. 202 F.2d at 559.

This is not the end of the majority's difficulties with *Prudence-Bonds*. My brothers go to great lengths to show —wrongly, I believe—that "other creditors or stockholders would not be affected" by Caplin's action in this case. But the reorganization in *Prudence-Bonds* had already been effected and would not likely to be altered retrospectively. Even had the suit been brought before a plan had been approved, the recovery would have inured to the benefit of no one but the bondholders, as is the case here.

There is a more fundamental answer, however, to the argument that only one class of creditors will be affected if Caplin recovers. Although the bondholders' recovery will swell directly only the purses of the bondholders, the majority ignores the central consideration that certainty as to the bondholders' rights against the indenture trustee cannot fail to affect the views of the interested parties and the court in passing on the fairness of the reorganization plan. 11 U.S.C. § 621(2). The majority thus seems to misconstrue the true scope and nature of a reorganization proceeding. The process of reorganizing is not performed merely by a nice, sharp, precise and mathematical apportionment of a debtor's estate according to fixed for-

mulas. Rather, the objective is carried out through a process of negotiation, and some give-and-take, in an attempt to adjust equitably and with sensitivity to the nuances of the individual case the rights of competing interested parties. As Judge L. Hand argued persuasively in dissenting from the decision in Clarke, the reorganization court has jurisdiction over a case such as this as part of its obligation to "adjust the mutual rights of the debtor's creditors as between themselves." 137 F.2d at 802. I see no reason for denying to the reorganization court, as the majority does, the power to discharge this obligation here or properly to perform its duty to adjudge the equitableness of a proposed reorganization plan.

This latter consideration is particularly relevant to this case, where it appears that the indenture trustee may be implicated in the causes for Webb & Knapp's bankruptcy. As Judge Hand put it, "the trustee should have prevented the debtor from siphoning its assets away from its creditors—the bondholders along with the other general creditors. . . . The loss was . . . of the debtor's assets; the remedy will be in their restoration; I do not understand how that can be alien to a reorganization." 137 F.2d at 802.

Thus, the parade of horribles which my brothers assert would follow if Caplin were allowed to bring this claim —including virtually the confiscation of property of parties with no semblance of due process—is a phantasm. We are concerned here only with the standing of a trustee in reorganization to *assert* the claims of creditors, not to *cancel* them, where the reorganization trustee asserts that creditors have been damaged along with all other parties to the reorganization by the indenture trustee's negligent failure to protect the debtor's assets. It is a very narrow proposition that the majority rejects, not an infinitely expandable one. By rejecting it, the majority retreats from this court's previously declared commitment to the flexible approach announced in *Prudence-Bonds.*

Moreover, the view of the majority appears significantly narrower than that of the *Clarke* majority. That court was unwilling to constrict itself to the narrow "property" analysis advanced by the majority, but suggested instead that the indenture trustee might have standing if "the claims for breach of the covenants [were] any part of the property of the bankrupt *or* would affect the plan of reorganization." (Emphasis added.) 137 F.2d at 800. Immediately following this sentence, the *Clarke* court launched upon an extended discussion of the question whether the claim would affect the plan after which it appended, almost as an afterthought, the observation that "Moreover the trustee . . . has no title to the claims embraced in the first and third counts. . . ." Although I believe that the *Clarke* majority was in error to hold that the claim would not affect the plan, its analysis was considerably broader than that adopted by my brothers.

Finally, the result today ill serves two reforms central to the scheme of the Chandler Act: to promote the collection and dissemination of all information relevant to the debtor and its affairs and to involve the Securities and Exchange Commission in complex reorganization proceedings as an advisor or friend of the court, a role it has assumed as a party to this appeal, in urging us to permit Caplin to pursue his claims. See H. Report No. 1409 on H.R. 8046, 75th Cong., 1st Sess., 47-48 (1937).

The reorganization trustee is empowered to undertake a comprehensive investigation into the history and financial condition of the debtor by 11 U.S.C. § 567. To compel the bondholders in these circumstances to proceed individually or in a separate class action, would only give rise to a massive redundancy of fact-finding. To restate the point somewhat more positively, a fair adjudication of the issue between the bandholders and Marine will be promoted if

the information available to the trustee is efficiently brought to bear in that dispute and revealed to the court.[1]

Scrutiny or active participation by the SEC is provided for by numerous provisions of Chapter X (11 U.S.C. §§ 561, 567(5), 571-74, 590, 608, 622). On few issues is that agency's expertise more relevant than in a case such as this, involving the adjudication of rights and duties of a trustee functioning under the Trust Indenture Act of 1939, 15 U.S.C. §§ 77aaa *et seq.* This expertise will be available in a reorganization proceeding but ordinarily not in individual or class action bondholders' suits.

In short, today's decision not only retreats from past precedent but is contrary to the purposes which motivated Congress to enact the Chandler Act.

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[1] The manifest inconvenience of the *Clarke* rule is magnified in a case where, as here, the indenture trustee filed a claim against the estate of the debtor for his services as trustee. A determination of the merits of Caplin's plenary action and counter-claim will not require the bankruptcy court to investigate any matters that it would not have to pass upon in adjudicating Caplin's objection to Marine's claim.